REMEDY FOR ARTIFICIAL PRICING OF ARTICLES PRODUCED BY NONMARKET ECONOMY COUNTRIES

HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL TRADE

OF THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 958

JANUARY 29, 1982

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REMEDY FOR ARTIFICIAL PRICING OF ARTICLES PRODUCED BY NONMARKET ECONOMY COUNTRIES

FRIDAY, JANUARY 29, 1982

U.S. SENATE,
SUBCOMMITTEE ON INTERNATIONAL TRADE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:34 a.m., in room 2221, Dirksen Senate Office Building, Hon. John C. Danforth (chairman) presiding.

Present: Senators Danforth, Heinz, Long, and Byrd.

[The press release announcing the hearing and the prepared statements of Senators Danforth and Heinz follow:]

Press Release No. 82-102

PRESS RELEASE

FOR IMMEDIATE RELEASE
January 8, 1982

UNITED STATES SENATE
COMMITTEE ON FINANCE
Subcommittee on International Trade
2227 Dirksen Senate Office Building

FINANCE SUBCOMMITTEE ON INTERNATIONAL TRADE SCHEDULES HEARING ON S. 958, A BILL TO AMEND THE TRADE ACT OF 1974 TO PROVIDE A SPECIAL REMEDY FOR THE ARTIFICIAL PRICING OF ARTICLES PRODUCED BY NONMARKET ECONOMY COUNTRIES

The Honorable John C. Danforth (R., Mo.), Chairman of the Subcommittee on International Trade of the Committee on Finance, announced today that on January 29, 1982, the Committee will hold a hearing on S. 958. This bill, introduced by Senator John Heinz (R., Pa.), would amend the Trade Act of 1974 and the Tariff Act of 1930 to provide a special remedy for the artificial pricing of articles produced by nonmarket economy countries.

The hearing will begin at 9:30 a.m. in Room 2221 of the Dirksen Senate Office Building.

Chairman Danforth stated that Administration and private witnesses are expected to testify. Witnesses are requested in particular to address the following issues, among others they may wish to discuss:

(1) How to define a nonmarket economy country;

(2) aspects of trade with nonmarket economy countries that are uniquely trade-distorting, including artificial pricing techniques;

(3) the adequacy of current U.S. law and practice that address such trade-distorting practices;

(4) the concepts of "artificial pricing" and "lowest free-market price of like articles" in S. 958; and

(5) how the approach taken by S. 958 to nonmarket economy country unfair trade practices relates to international trading rules.

BEST COPY AVAILABLE

Opening Statement of Senator Danforth

Today we address a recurrent problem in the administration of our trade laws: How fairly to assimilate into our trading system goods that are produced in and exported from economic systems operating under principles bearing little or no relation to our own. The Congress has often expressed concern that the political, strategic and economic considerations that induce centrally planned export decisions may not only unfaily prejudice the competitive efforts of U.S. industries, but also threaten broader U.S. national interests. Thus, section 406 of the Trade Act of 1974 was intended to provide a special remedy for market disruption caused by rapidly increasing imports from communist countries. Similarly, section 773(c) of the Tariff Act of 1930 offers an alternative method of calculating the foreign market value of State-controlled economy goods that are allegedly dumped here. Our concern today is that these and related provisions of the trade laws are inadequate.

Use of section 406, for example, never has resulted in relief for the petitioning U.S. industry. Petitioners are faced with the difficult task of showing that imports are not just increasing, but doing so rapidly, and that their injury is material and results substantially from a single source. Even if one hurdles these obstacles, the industry must then convince the President to separate sufficiently the merits of the case from diplomatic considerations of the moment to grant relief. Of course, the uncertainties of this process equally affect purchasers and sellers of the imported product. I will be interested to hear one of our witnesses discuss the unhappy circumstances surrounding the Russian Ammonia case—unhappy for all concerned, I believe.

So too has the administration of the dumping law proved unsatisfactory. It is difficult to obtain reliable price and cost data from nonmarket economy producers, even if they wish to cooperate. Although the necessity of finding some reliable value calulation requires the Commerce Department's best efforts to construct costs absent reliable data, even if a surrogate economy must serve as the basis, I understand that many importers and domestic petitioners alike have little confidence in the results.

Occassionally, it appears that the combination of inadequacies in sections 773(c) and 406 can lead to perverse results. I understand, for example, that in one recent case the U.S. company failed in its section 406 petition for relief because the imports were not increasing rapidly. It gained an affirmative dumping order from the Commerce Department based on value in a surrogate country—but it failed to gain real relief, because the margins were eliminated by subsequent exchange rate fluctuations in the surrogate country's currency! Except use as a hypothetical exporter, or course the surrogate has no relation with the real case at all.

I believe that a simplified, reliable way of calculating the fair value of nonmarket economy good is essential to the proper operation of our dumping laws. And I think it is wrong to offer U.S. industries the false hope of protection obstensibly provided by section 406. S. 958 provides one means of addressing these concerns. On the other hand, in most cases S. 958 would deny importers the usual benefit of a requirement that domestic industries show they are being injured by the artifical pricing the bill would prescribe. Whether this is a good policy, and consonant with our international obligations, is another issue on which I hope to hear more today.

Opening Statement of Senator John Heinz

I am particularly pleased that we are having this hearing on S. 958. It represents the results of 2 years of work on this legislation, work which has involved extensive consultations with the private sector, two administrations, and representatives of nonmarket economies. The bill has been through two major drafts and a host of minor ones, and I expect a few additional revisions will be necessary during markup.

This hearing is also important for another reason. S. 958 quite possibly represents the first significant trade legislation the Finance Committee will consider since the Trade Agreements Act became law in 1979. At that time there was general agreement that a number of issues had been left for later resolution, including action on safeguards and non-market economy legislation. While I plan shortly to introduce legislation on the safeguards issue, today's hearing will concentrate on the latter issue.

In my view consideration of this issue is particularly timely due to the growing complexity of our trade relations with socialist economies. Increased trade has produced more unfair trade practice cases involving non-market economies and consequently more dissatisfaction with present law. I expect several of our witnesses today will have more detailed comments on the inadequacy of present law, but they will all be based on one fundamental deficiency—the concept of dumping—sales at less than fair value—is inherently a free-market concept. It is useful only to the extent that costs and prices in an economy are real, so that a fair value can be determined. With rare exceptions, these conditions do not exist in a non-market economy, and our law has become seriously contorted in an effort to deal logically with this fundamental inconsistency.

Since 1978, U.S. administrative regulations have attempted to cope with these problems through the use of the comparable economy concept. In this approach, a free-market country at a comparable stage of economic development with the non-market country is selected and the price of a like article in that economy (or the constructed value of the article—what it would cost to produce it) is used to make the comparison.

This concept, however, is flawed in several important respects, notably in its two basic assumptions that a simple and accurate basis exists for determining when economies are at comparable stages of development and that comparable overall levels of development—assuming such can be determined—mean comparable levels within a particular industry. For example, when a country has targeted a particular industry for rapid development in order to stimulate its export sector, the level of development in that industry is likely to be greater than the economy as a whole, thus making industry specific comparisons based on aggregate national analyses highly misleading.

S. 958 seeks to deal with this problem by replacing both section 406 of the Trade Act of 1974 and the non-market sections of the Antidumping Act with a new system based on the principles of treating non-market economies as much like Western economies as possible and of providing a fairer and more certain means of determining whether an unfair practice has occurred.

Let me emphasize this latter point—GAO studies and other evidence presented to Congress in different contexts makes clear that uncertainty is one of the major deterrents to trade. One of the biggest drawbacks of present law is the uncertainty that the investigatory process creates for both parties in a dispute.

In S. 958, an interested party could file a complaint against a non-market economy alleging artifical pricing. Procedures and time limits for the ensuring investigation are the same as in a countervailing duty investigation.

During the course of the investigation, the Commerce Department would consult with the nonmarket economy's government and solicit from it information that would enable the Department to determine dumping or the presence of a subsidy subject to the standards of current law for free-market economies.

If, in the Department's judgment, sufficient, verifiable information is provided to permit the case to be treated as a normal antidumping or countervailing duty case, then the Department shall do so, moving the investigation to the appropriate track at the same point in time, and applying the injury test as appropriate if the non-market economy in question has signed the relevant code. Of course, the provisions of those statutes permitting suspension of the investigation would also apply, as would all other provisions of current law.

In those cases where the nonmarket economy will not or cannot provide the necessary information, preventing the complaint from being handled in a normal way, a different standard would be employed. That standard would define artificial pricing as sales below the price of the lowest average price free market producer with appropriate adjustments. Even in this case, however, the petition would be treated pursuant to the time frames and procedures applicable to countervailing duty investigations in existing law. In short, the current concept of a section 406, which in many ways parallels section 201, would cease to exist, and instead the section would be redesigned to deal with unfair trade practices by nonmarket economies rather than simple market disruption. The latter could be handled through existing escape clause procedures under section 201 of the Trade Act of 1974. This approach is more consistent with the division in current law between fair and unfair trade practice relief provisions and is intended to conform to that division.

In my judgment, we have tried to create with this legislation a carrot and stick mechanism that will encourage non-market economies to cooperate with our government in investigating the allegations in petitions filed against them and to adjust their economies in a way that will permit such cooperation to take place. Every opportunity is presented to treat these countries in these cases precisely as all other nations are treated under our laws, even to the extension of the injury test in appropriate cases. This represents a normalization of present law; while at the same time the alternative "lowest average price free market producer" test provides a certainty and administrative ease of determination absent in present regulations.

I am particularly pleased to have as our first witness today, Lionel Olmer, the Under Secretary of Commerce. As the agency charged with administering current law, the Commerce Department, and Mr. Olmer in particular, know better than most the problems with it. I know the Department has been involved in a careful analysis of the bill and has a number of technical suggestions based on this experience with nonmarket cases that will be presented at the appropriate time. I am looking forward to hearing those suggestions, as well as the testimony of our other expert witnesses so that the committee can then move on to mark up this legislation.

Senator HEINZ. This hearing of the Senate Finance Committee's Subcommittee on International Trade has been called to hear testimony on S. 958, dealing with unfair trade practices by nonmarket economies.

The chairman of this subcommittee, Senator Danforth, has had a great interest in this matter. And as the author of S. 958, I am deeply grateful to Senator Danforth, who will be joining us shortly, for calling this hearing.

I am grateful to Senator Danforth not only for his interest but specifically because this hearing represents some 2 years of work on this legislation coming to a conclusion. That work is embodied in the bill that is a subject of this hearing. It has also involved extensive consultations with the private sector, two different administrations, and representatives of the nonmarket economies themselves. The bill has been through two major drafts and a host of minor ones. And I expect a few additional revisions will be necessary during markup.

In my view, consideration of this issue is particularly timely because of the growing difficulties in our trade with socialist and communist countries. These Government-controlled economies are capable of targeting exports that can be manufactured in mass quantities and then dumped on the American market at low cost to capture market share and earn foreign exchange.

Our existing trade laws encourage this kind of activity. And, in fact, our laws do not really address the underlying structural differences between market and nonmarket economies. As a result, it has been almost impossible for the Commerce Department, which administers our laws, to learn the cost, prices, and exchange rates that these countries use and all necessary information under current law.

I expect several of our witnesses today will have more detailed comments on the inadequacy of present law, but I suspect they will all be based on one fundamental deficiency. And that is that the concept of dumping is inherently a free market concept. It is useful only to the extent that cost and prices in an economy are real so that the fair value can be determined. With rare exceptions, these conditions do not exist in a nonmarket economy, and our law has become seriously contorted in an effort to deal logically with this basic inconsistency.

Current practice is flawed in several important respects, notably, in its two basic assumptions that a simple and accurate basis exists for determining when economies are at comparable stages of development and the comparable overall levels of development—assuming such can be determined—means comparable levels within a particular industry.

S. 958 seeks to deal with this problem by replacing both section 406 of the Trade Act of 1974 and the nonmarket sections of the Antidumping Act with a new system based on the principles of treating nonmarket economies as much like western economies as possible. And by providing a fairer, more certain means of determining whether an unfair trade practice has occurred.

Uncertainty is one of the major deterrents to trade. One of the biggest drawbacks of present law is the uncertainty that the investigatory process creates for both parties in the dispute. In S. 958, an interested party could file a complaint against a nonmarket economy alleging artificial pricing. Procedures and time limits for the ensuing investigation are the same as a countervailing duty investigation.

If in the Department's judgment sufficient verifiable information is provided to permit the case to be treated as a normal antidumping or countervailing duty case then the Department shall do so, moving the investigation to the appropriate track at the same point in time and applying the injury test as appropriate if the nonmarket economy in question has signed the relevant code.

In those cases where the nonmarket economy will not or cannot provide the necessary information, preventing the complaint from being handled in a normal way, a different standard would be employed. That standard would define artificial pricing as sales below the price of the lowest average price free market producer with appropriate adjustments. Even in this case, however, the petition would be treated pursuant to the timeframes and procedures applicable to countervailing duty investigations.

In my judgment, we have tried to create with this legislation a carrot-and-stick mechanism that will encourage nonmarket economies to cooperate with our Government in investigating the allegations in petitions filed against them and to adjust their economies in a way that will permit such cooperation to take place. Every opportunity is presented to treat these countries in these cases precisely as all other nations are treated under our laws, even to the extension of the injury test in appropriate cases. This represents a normalization of present law, while at the same time the alternative lowest average price free market producer test provides a certainty and administrative ease of determination absent in present regulations.

Taken together, I believe the provisions of my bill and the safeguards built into it will thwart any socialist or Soviet block country's effort to concentrate unfair attacks on our industries and workers.

Mr. Chairman, I want to express my gratitude to you for this hearing. I want to take particular note of our first witness, Lionel Olmer, the Under Secretary of Commerce, whose Department is charged with administering our trade laws, that you have had so much to do with the formulation of over the years. And I think that we have the opportunity to have a very constructive hearing.

Senator DANFORTH. Senator Heinz, thank you. Mr. Olmer, please proceed.

STATEMENT OF HON. LIONEL H. OLMER, UNDER SECRETARY OF COMMERCE FOR INTERNATIONAL TRADE

Mr. OLMER. Thank you, Mr. Chairman, Senator Heinz. I have submitted a prepared statement from which I would like to summarize a few points.

First off, Mr. Chairman, I want to tell you that I am pleased to be able to report that the administration supports the purpose and basic thrust of your bill, Senator Heinz, which would provide a special remedy for the artificial pricing of articles produced by nonmarket economy countries.

I perhaps didn't realize the extent of the difficulty in acquiring that support in the administration but I now know it, and we do have it.

Our goal in the Reagan administration is the establishment of consistency and predictability in the administration of our trade laws, taking into account at the same time economic and commercial conditions and our national security interests. We, thus, consider consideration of S 958 to be opportune and most timely. Because, in part, our experience in the past 2 years with antidumping cases involving imports from nonmarket economies has led us to believe that the present statute and the regulations are both burdensome and complicated. The administration of such cases has been very costly in terms of staff time and extremely expensive for both the U.S. petitioner and the foreign respondent. Indeed, the costs, we believe, have discouraged U.S. petitioners from seeking relief from unfair and injurious competition. Simply stated, the antidumping and countervailing duty laws are market based, as you have pointed out. We cannot calculate either a true home market price or cost in the absence of free-market behavior.

Under the current statute, we look to the prices or cost of surrogate producers in comparable countries. Thus, since 1980, in January, three cases have been decided involving nonmarket economy countries. We have determined in those cases that the People's Republic of China is comparable to Paraguay, East Germany to West Germany, and Hungary to Italy. We think though we have faithfully followed the statute some would say it is not only difficult but impossible to apply in the best interest of all parties.

While the Department does not agree with all aspects of S. 958, we believe it should continue to be given the most careful consideration by the committee. We do, indeed, look forward to working with you in this process. The proposed artificial pricing remedy and methodology are a great improvement.

Let me highlight a few points of agreement with the bill, and some changes that we suggest.

First, we are pleased with its relative simplicity. The greater degree of commercial certainty, which a more simple test of procedures will bring, is sought after highly by both domestic and foreign interests. At the present, many potential petitioners are probably deterred from seeking justified relief by the complete unpredictability of the result.

It is precisely because we don't think we can truly measure prices or costs in a nonmarket economy that we think the artificial pricing concept is simple, predictable, and nondiscretionary for nonmarket economy dumping cases. We believe the definition of nonmarket economy country, as currently contained in the bill, is adequate and administrable, subject to some minor changes in the language. The majority of cases are filed on merchandise from countries which are obviously market or nonmarket in nature. Petitions concerning imports from countries whose economic structures and commercial practices are unfamiliar or are believed to be nonmarket, would require further investigation as to the presence of market forces in their particular economies. Each case would be unique. There can be no automatic checklist of the type of definition of market versus nonmarket.

How would the Commerce Department make the judgment? Well, we would look at whether prices or costs of the merchandise at issue are determined in a marketplace to an extent that normal antidumping or countervailing duty standards could be applied. If so, we would go ahead under our procedure for normal cases, and if not, we would apply the artificial pricing remedy.

We are pleased that S. 958 allows the administering authority, the Commerce Department, to take cognizance of those rare and special situations where the nonmarket producer is significantly influenced by market forces and has the commercial ability and autonomy to engage in price discrimination and to adjust its behavior in response to the receipt of subsidies.

We agree with 958 that these rare instances should be treated under the normal provisions of our antidumping and countervailing duty laws. Such producers should be held to no less of the standard than market economy producers in enjoying the benefits of access to our markets.

We believe that S. 958 takes a good step by making the entire process significantly less cumbersome and complex. In that way, the artificial pricing approach reduces the overall cost to both petitioners and respondents in pursuing an unfair trade case. That approach may minimize the disruptions of trade caused by the uncertainty in the market during the investigation of a case.

Now although we agree with the overall thrust of the bill, there are areas which we believe should be adjusted to make the approach more similar to our overall approach to unfair trade complaints under the antidumping and countervailing duty laws. We believe that the definition of petitioner who has standing should be the same as for antidumping or countervailing duty laws. We believe participants in an artificial pricing case should have the same rights of judicial review as are now provided for in antidumping and countervailing duty proceedings. We believe that the provision in the bill for duty assessment requires revision. The artificial pricing duty is very similar to the present antidumping duty and that it should reflect an entry-by-entry comparison of the price of the merchandise, subject to an artificial pricing order and our fair pricing standard.

In the bill at present, there are no provisions for review and revocation of outstanding artificial pricing orders. We believe that these orders should be annually reviewed, and, if appropriate, revoked, as is not provided for in the review proceedings for antidumping cases.

Finally, we believe that the provision in the bill granting an injury test only to signatories of the Antidumping Code of the GATT is too limited. We believe that the bill must contain an injury test which is in harmony with current U.S. antidumping and countervailing duty practices, and which abides by the requirements of our international obligations.

We will review with interest, and I promise you care, any suggestions made by witnesses at this hearing. We do look forward to working with the members and staff in coming up with a solution to a difficult problem.

Thank you.

[The prepared statement follows:]

STATEMENT OF LIONEL H. OLMER
UNDER SECRETARY OF COMMERCE
FOR INTERNATIONAL TRADE

BEFORE THE SUBCOMMITTEE ON TRADE
OF THE COMMITTEE ON FINANCE
UNITED STATES SENATE
WASHINGTON, D.C.

JANUARY 29, 1982

Mr. Chairman,

I appreciate the opportunity to appear before the Subcommittee to inform you of the Department's views on S.958, a bill to amend the Trade Act of 1974 to provide a special remedy for the artificial pricing of articles produced by non-market economy countries.

A priority of the Reagan Administration is to review our trade policy as it applies to non-market economy countries. Our goal is establishment of consistency and predictability, taking into account economic and commercial conditions as well as our national security interests. Both export and import policy are undergoing a thorough reexamination. In light of this, the consideration of S.958 is opportune.

The Administration strongly supports open and free trade, but we cannot condone importation of merchandise from non-market economy countries, or from any country, which is unfairly traded . U.S. business and labor rightfully expect and deserve an effective remedy which is accessible and timely when they are being affected by unfair foreign competition, whether from market or non-market economy countries.

As you know, the Department of Commerce has responsibility for administering two laws concerning unfair import trade, the antidumping and countervailing duty laws. While imports from non-market economy countries are provided for in the antidumping law, the countervailing duty law is silent on the distinction between market and non-market economy countries .

The provisions of the antidumping law dealing with imports from non-market economy producers require the Department to look to the prices and costs of a producer in a free-market economy as a surrogate "fair value" for the imported product from the non-market economy. This approach means that potential U.S. petitioners and the state-controlled economy producers have considerable difficulty accurately predicting what "fair value" will be, because in each case fair value depends upon the selection by the Department of Commerce of a surrogate producer in a surrogate country after the investigation has commenced. This selection must be done for each new case and again during each annual review of an order to set the duty assessment and cash deposit rates.

By contrast, the antidumping law in cases dealing with merchandise from market economy producers assumes that the foreign exporter will know in advance whether it is dumping in our market since the Department looks to that exporter's own prices or costs as the "fair value" standard rather than those of a surrogate. In this way, the market economy producer is totally responsible for and can exercise control over its possible dumping behavior.

Although we continue to vigorously enforce the current law, the Department of Commerce's experience in the past two years with antidumping cases involving imports from non-market economy countries leads to the belief that the present statute and regulations are burdensome and complicated. Administration of these cases is very costly in terms of staff time and quite expensive for both U.S. petitioner and foreign respondent. Indeed, these costs discourage U.S. petitioners from seeking relief from unfair and injurious competition. Thus, the results of any investigation may be highly unpredictable, difficult to calculate, and based on commercial behavior of a producer not involved in the alleged unfair trade practice.

Quite simply, the antidumping and countervailing duty laws are market based. We cannot calculate either a true home market price, or cost, in the absence of free market behavior. Under the current statute, we look to the prices or costs of surrogate producers in comparable countries. Since the Commerce Department assumed responsibility for these laws in January 1980, three cases have been decided involving non-market economy countries. We have determined in those cases that the Peoples Republic of China is comparable to

Paraguay; East Germany to West Germany; and Hungary to Italy. We think that we have faithfully followed the statute, but some would say it's a difficult one to apply at best. At the same time, an alternative remedy, Section 406 of the Trade Act of 1974 applicable to market disruption from communist countries, has proven a disappointment to our domestic industries. There have been only seven petitions involving four industries in its seven year history. In five cases the ITC found no market disruption. In the other two, the President denied relief. Furthermore, relief similar to that available under the current Section 406 continues to be available under Section 201.

While the Department does not agree with all aspects of S.958, we believe that it should continue to be given careful consideration by this Committee. In particular, the proposed artificial pricing remedy and methodology appears to be a great improvement in those cases where the product under investigation is not made in any market economy other than the United States. During the remainder of my testimony I would like to discuss specific points of agreement with S.958 and highlight certain changes we would suggest with the artificial pricing approach as described in the bill.

First and foremost we are pleased with the relative simplicity of this proposal. The greater degree of commercial certainty which a more simple set of procedures will bring is highly sought after by both domestic and foreign interests. A simpler approach to the problem of unfair import competition from non-market economy producers should make legitimate relief more attainable. At the present, many potential petitioners are probably deterred from seeking justified relief by the complete unpredictability of the result (which depends on both the Department's choice of a comparable country and the willingness of an uninvolved producer in that country to cooperate). Under the artificial pricing approach, a industry in the United States should have a good idea of price levels in the marketplace here, and from that information can judge in advance the viability of its petition. At the same time, the artificial pricing approach will enable non-market economy exporters to reasonably anticipate what we would consider a fair import price and therefore choose whether or not they wish to participate in our market in accordance with our rules on fair trade. This stands in contrast to our present statutory provisions which impose a fair value standard of which the non-market economy producer has no knowledge at the time of sale and over which he has no control.

The most frequently heard criticism of the artificial pricing concept is that it does not permit a non-market economy producer to demonstrate that its prices or costs in the home market permit it to undersell legitimately all other producers selling in the U.S. market. This criticism presupposes that one can determine accurately the prices or costs in the home market. Yet it is precisely because neither we nor the producers themselves can determine the home market costs or prices that we cannot use our normal antidumping or countervailing duty procedures. Similarly, some claim that S.958 allows non-market economy producers to dump in the U.S. as long as they do not undersell the lowest price seller here. Once again, this assumes that we can determine when a non-market economy exporter is dumping--which is what we cannot do satisfactorily. It is precisely because we do not think that we can truly measure prices or costs in a non-market economy that we think the artificial pricing concept is a simple, predictable, and non-discretionary remedy for non-market economy dumping.

We believe the definition of non-market economy country as currently contained in this bill is adequate and administrable, subject to some minor changes in language. Upon receipt of any petition alleging an unfair trade practice, we would determine whether the merchandise was exported from a market or a non-market economy country. In most cases, this would be an easy decision. The majority of cases are filed on merchandise from countries which are obviously market or non-market in nature. Petitions concerning imports from countries whose economic structures and commercial practices are unfamiliar or believed to be non-market would require further investigation as to the presence of market forces in their particular economy. Each case would be unique. There can be no automatic check-list type of definition of market vs. non-market.

Although all governments influence the activities of their commercial sectors, the key difference between market and non-market economies is the method chosen by governments to exert this influence. In market economies governments affect business decisions indirectly by sending signals through the economy's marketplace system of relative prices. Governments pursue monetary, fiscal, and balance-of-payments goals through the use of taxes and incentives, money supply expansion or contractions, government spending, and purchases and sales in the foreign exchange market. In this context, prices and costs provide a sufficient basis for antidumping determinations, and the marketplace provides us standards against which to measure subsidization.

In non-market economies, however, government intervention is much more direct. Typically there is a central planning group which sets industry and/or sectoral goals for the short as well as long term. To achieve these goals, production functions and relative prices are manipulated directly. Among the more common tools are direct allocations of input factors and complex regulation of their use. Output prices are often directly set to reflect overall economic goals rather than relative scarcities and indigenous demand. These methods of intervention generally result in prices and costs at the company level which cannot be used to develop a standard of fair value.

How would the Commerce Department make this decision? We would look at whether prices or costs of the merchandise at issue are determined in a marketplace to an extent that normal antidumping or countervailing duty standards could be applied. If so, we would go ahead under our procedure for normal cases. If not, we would apply the artificial pricing remedy.

We are pleased that S.958 allows the administering authority to take cognizance of those rare and special situations where the non-market producer is significantly influenced by market forces and has the commercial ability and autonomy to engage in price discrimination and adjust his behavior in response to the receipt of subsidies. There is evidence that in some non-market economy countries, affirmative decisions have been made not to regulate certain industries or sectors. The commercial goals and constraints in these sectors can be nearly identical to those operating in a market economy country. It appears that firms in these sectors could be market oriented and in these instances their prices and costs may be potentially meaningful in the context of an unfair trade investigation. Therefore, we agree with S.958 that these rare instances should be treated under the normal provisions of our antidumping and countervailing duty laws and these producers should be held to no different or less of a standard than market economy producers enjoying the benefits of access to our market.

Last, we believe S.958 takes a good step by making the entire process significantly less cumbersome and complex. In this way the artificial pricing approach reduces the overall cost to both petitioners and respondents in pursuing an unfair trade case. This approach may minimize the disruption to trade caused by the uncertainty in the market during the investigation of a case.

Although we agree with the overall thrust of this bill, there are areas which we believe should be adjusted to make this approach more similar to our overall approach to unfair trade complaints under the antidumping and countervailing duty laws. I would like to highlight a few of these areas during the remainder of my testimony.

We believe that the definition of "petitioner" who has standing should be the same as for the antidumping or countervailing duty laws. The artificial pricing remedy, like the dumping and countervail remedies, is meant to protect the U.S. industry and its workers, and thus the right to petition should be held by the affected U.S. producer, workers in the affected industry, or a group of producers together or through their trade association. Also, the administering authority should have the right to self-intitiate if circumstances warrant.

But . . .

We believe participants in an artificial pricing case should have the same rights of judicial review as are provided now for antidumping and countervailing duty proceedings. In essence, both petitioners and foreign respondents have the right to challenge many preliminary and all final determinations. We do not think that the choice of the method of analysis (artificial pricing vs. "normal" dumping or countervail) should be subject to interlocutory judicial review. If it were, the entire procedure could rapidly become quite costly and time consuming as competing groups of experts battled each other in briefs before the court on abstract points of the theory of market structure. All the while there would remain the commercial uncertainty surrounding the case. Trade would be disrupted as relatively minor intermediate determinations were litigated and appealed through various levels of our judicial system. Further, it is virtually certain that the proceeding would have concluded prior to resolution of such litigation. Thus, this intermediate determination is best subjected to review in the courts as part of the preliminary determination .

We believe that the provision in the bill for duty assessment needs revision. The artificial pricing duty is very similar to the present antidumping duty in that it should reflect an entry-by-entry comparison of the price of the merchandise subject to an artificial pricing order and our fair pricing standard. In other words, the assessed duty should equal the difference between the landed, duty-paid U.S. price and the determined artificial price level.

In the bill at present there are no provisions for review and revocation of outstanding artificial pricing orders. We believe that these orders should be annually reviewed and, if appropriate, revoked as is now provided in the review procedures for antidumping and countervailing duty proceedings.

Last, we believe that the provision in the bill granting an injury test only to signatories to the Antidumping Code of the GATT is too limited. We strongly believe that the bill must contain an injury test which is in harmony with current U.S. antidumping and countervailing duty practices while abiding by the requirements of our international obligations.

When Senator Heinz introduced S.958, he stated that he welcomed debate on this subject. We will review with interest any suggestions made by the witnesses at this hearing, and look forward to working with the members and staff in coming up with a solution to this difficult problem for our trade laws.

Thank you.

STATEMENT OF HON. HARRY KOPP, DEPUTY ASSISTANT SECRETARY OF STATE FOR TRADE AND COMMERCIAL DEVELOPMENT

Mr. Kopp. Thank you. I have also submitted a statement for the record, Senator. I have very little to add to what Mr. Olmer has said. We are in complete agreement on this issue, as I believe we are throughout the administration.

The current laws are not effective; they are not providing adequate protection for American interests. They operate, as well, to interfere with the smooth development of our commercial relationships with nonmarket economy countries because exporters in those countries do not have any way of determining with any reasonable degree of assurance of how they can price their products and not run afoul of U.S. law. So even from the exporter's point of view, the current system is one that really could require some change.

The revisions proposed in S. 958 and the modifications suggested by Mr. Olmer, I think, would go a very long way toward improving the situation for U.S. producers and providing possibilities for the smooth development of our commerce with those nonmarket economy countries with which we have commerical interests.

Thank you.

[The prepared statement follows:]

STATEMENT OF HARRY KOPP
DEPUTY ASSISTANT SECRETARY OF STATE
FOR TRADE AND COMMERCIAL DEVELOPMENT

BEFORE THE SUBCOMMITTEE ON INTERNATIONAL TRADE
OF THE COMMITTEE ON FINANCE
UNITED STATES SENATE

JANUARY 29, 1982

I APPRECIATE THE OPPORTUNITY TO OFFER THE STATE DEPARTMENT'S VIEWS ON S.958, WHICH WOULD AMEND THE TRADE ACT OF 1974 TO PROVIDE A SPECIAL REMEDY FOR THE ARTIFICIAL PRICING OF ARTICLES PRODUCED BY NON-MARKET ECONOMY COUNTRIES.

THE STATE DEPARTMENT HAS, OF COURSE, AN INTEREST IN MAINTAINING THE INTEGRITY OF OUR INTERNATIONAL OBLIGATIONS IN THE TRADE FIELD, BUT WE HAVE ONLY A MINOR ROLE IN THE ADMINISTRATION OF U.S. ANTIDUMPING AND COUNTERVAILING DUTY LAWS. THAT ROLE IS TO ENSURE THAT OUR POSTS ABROAD SUPPORT THE COMMERCE DEPARTMENT IN ITS OVERSEAS INVESTIGATIONS OF UNFAIR TRADE PRACTICE ALLEGATIONS. THE COMMERCE DEPARTMENT SPEAKS AUTHORITATIVELY ON TECHNICAL QUESTIONS REGARDING THE ADMINISTRATION OF THE COUNTERVAILING DUTY AND ANTIDUMPING LAWS, AND I WILL THEREFORE DEFER TO MY COLLEAGUES FROM THE

DEPARTMENT OF COMMERCE ON QUESTIONS OF HOW S. 958 MIGHT AFFECT THE ADMINISTRATION OF THOSE LAWS.

DESPITE STATE'S LIMITED INVOLVEMENT IN THE ADMINISTRATION OF THESE LAWS, THE DEPARTMENT RETAINS A STRONG INTEREST IN HOW WE APPLY THE ESSENTIALLY MARKET-ORIENTED CONCEPTS OF DUMPING AND SUBSIDY TO THE TRADE PRACTICES OF NON-MARKET OR STATE-CONTROLLED ECONOMIES. I HAVE HAD SOME PROFESSIONAL INVOLVEMENT IN THIS PROBLEM FOR THE PAST 10 YEARS, AS A MEMBER OF THE U.S. EMBASSY IN WARSAW IN THE EARLY 70's AND SUBSEQUENTLY IN THE STATE DEPARTMENT'S OFFICES OF EAST-WEST TRADE AND INTERNATIONAL TRADE.

FROM MY EXPERIENCE IN THIS FIELD, I HAVE REACHED THE CONCLUSION THAT THE EXISTING STATUTES FOR IMPORTS FROM NON-MARKET ECONOMIES DO NOT OPERATE EFFECTIVELY. THE PROCEDURES REQUIRED BY THE CURRENT LAW ARE ADMINISTRATIVELY COMPLEX AND EXPENSIVE FOR THE ADMINISTERING AUTHORITY AND THE PETITIONER. THEY COMPLICATE UNNECESSARILY OUR BILATERAL RELATIONS WITH NON-MARKET GOVERNMENTS, WHICH, LIKE OUR DOMESTIC PETITIONERS, FACE UNCERTAINTY, UNPREDICTABILITY, AND UNREASONABLE DELAY IN THE ADMINISTRATION OF THE LAW.

PERHAPS THE MOST EGREGIOUS FLAW IN THE EXISTING SYSTEM IS ITS ARBITRARINESS AND THE COSTLY UNCERTAINTY FOR U.S. PRODUCERS, U.S. IMPORTERS, AND NON-MARKET ECONOMY EXPORTERS. UNDER THE CURRENT SYSTEM, THE REMEDY AVAILABLE TO A US PRODUCER AND THE APPROPRIATE FAIR-MARKET VALUE FOR THE EXPORTER'S

PRODUCTS ARE DETERMINED BY THE SELECTION BY THE DEPARTMENT OF COMMERCE OF A SURROGATE PRODUCER (WHO IS A LIKELY COMPETITOR AS WELL) AND SURROGATE COUNTRY. NEITHER THE U.S. PRODUCER NOR INDEED THE NON-MARKET EXPORTER CAN KNOW IN ADVANCE WHAT THE SURROGATE WILL BE AND WHAT PRICE WILL BE FOUND TO CONSTITUTE "FAIR VALUE".

IF APPLYING THE CONCEPT OF DUMPING TO NON-MARKET ECONOMY EXPORTS IS AWKWARD, UNPREDICTABLE AND INAPPROPRIATE, APPLYING THE NOTION OF SUBSIDIZATION IS EVEN MORE PROBLEMATIC. WHERE VIRTUALLY ALL ECONOMIC ACTIVITY IS CONTROLLED BY THE STATE, THE NOTION OF SUBSIDY, LIKE THE NOTION OF TAXATION, LOSES ITS MEANING.

S. 958 WOULD REPLACE THE LANGUAGE CURRENTLY FOUND IN SECTION 406 OF THE TRADE ACT OF 1974. WE FAVOR A NEW APPROACH TO THE PROBLEMS WHICH THE DRAFTERS OF 406 SOUGHT TO ADDRESS.

SECTION 406 HAS INVOLVED OUR PRESIDENTS MATTERS WHICH, IF THEY HAD NOT INVOLVED STATE-TRADING COUNTRIES, WOULD HAVE BEEN DEALT WITH AT LOWER LEVELS OF GOVERNMENT. AND THE SELECTIVITY OF REMEDY UNDER SECTION 406 - IMPORT RESTRICTIONS MAY APPLY ONLY TO COMMUNIST-COUNTRY GOODS - WAS NOT ALWAYS APPROPRIATE.

FOR THOSE REASONS, PRESIDENTS HAVE BEEN RELUCTANT TO USE THE 406 REMEDIES. MANY PEOPLE IN AMERICAN INDUSTRY AND IN THE LEGAL COMMUNITY NOW CONSIDER THAT 406 IS NO LONGER A USEFUL TOOL TO PROTECT U.S. PARTIES FROM THE IMPACT OF THE TRADE DISTORTIONS THAT MAY OCCUR IN SITUATIONS WHERE NEITHER OUR PUBLIC OFFICIALS NOR NON-MARKET ECONOMY PRODUCERS CAN DETERMINE THE RELATIONSHIP BETWEEN THE EXPORT PRICE AND THE PRODUCER'S COSTS.

I AGREE WITH THE SPONSOR OF S. 958 THAT A SPECIAL REMEDY SHOULD BE AVAILABLE TO U.S. PRODUCERS WHO SUFFER FROM THE INJURIOUS EFFECTS OF THE NON-MARKET ECONOMIC SYSTEMS. THE PROPOSED "ARTIFICIAL PRICING" CONCEPT IS, FOR THE MOST PART, A SIMPLER AND MORE REASONABLE APPROACH THAN THE EXISTING PROCEDURES.

WE RECOGNIZE THAT THIS WILL ENTAIL AN ELEMENT OF WHAT SOME HAVE CALLED "ROUGH JUSTICE." BUT THE PRECISION OF THE RESULTS OF THE WAY WE HANDLE CERTAIN CASES NOW IS MORE THEORETICAL THAN REAL.

I WOULD LIKE TO ADDRESS BRIEFLY THE BASIC ELEMENTS WHICH THE STATE DEPARTMENT BELIEVES ARE ESSENTIAL FOR WHATEVER LAW IS EVENTUALLY ENACTED.

FIRST, WE WOULD LOOK FOR A LAW THAT IS TRANSPARENT. IT SHOULD ALLOW THE U.S. PRODUCER TO PREDICT, WITH SOME CERTAINTY, THE NATURE AND EXTENT OF THE REMEDY AVAILABLE TO HIM. THE LAW SHOULD ALSO ALLOW THE NON-MARKET EXPORTER

TO ESTIMATE, WITH REASONABLE CERTAINTY, WHAT PRICE HE MAY CHARGE U.S. CUSTOMERS WITHOUT VIOLATING U.S. TRADE LAW.

TRANSPARENCY DEMANDS THAT THE ADMINISTERING AUTHORITY BE PRECISE AND CLEAR IN EXPLAINING WHY A GIVEN COUNTRY IS CONSIDERED TO HAVE A NON-MARKET ECONOMY, SO THAT THE U.S. PRODUCER MAY CHOOSE AN APPROPRIATE AVENUE FOR RELIEF AND BENEFIT FROM THE REMEDY PROVIDED AS QUICKLY AS POSSIBLE. IT IS ALSO IMPORTANT FOR THE EXPORTER TO KNOW WHICH U.S. TRADE LAWS ARE APPLICABLE TO HIS SITUATION AND WHAT REQUIREMENTS HE WILL HAVE TO MEET TO BE CONSIDERED A "FAIR" TRADER IN THE UNITED STATES.

A SECOND PRIORITY WE VIEW AS IMPORTANT FOR ANY NEW LEGISLATION IS THAT IT ESTABLISH PROCEDURES THAT ARE SIMPLE TO UNDERSTAND, REASONABLY INEXPENSIVE TO INVOKE, AND QUICK TO ADMINISTER.

I MENTIONED BEFORE THAT WE THINK WE NEED A BIT OF "ROUGH JUSTICE" TO ACHIEVE OUR GOALS IN TRADE WITH NON-MARKET ECONOMY COUNTRIES. BUT WE SHOULD NOT GO FARTHER THAN WE HAVE TO. NEW LEGISLATION SHOULD COMPLEMENT OUR EXISTING COUNTERVAILING DUTY AND ANTIDUMPING LAWS, NOT REPLACE THEM. FOR EXAMPLE, PETITIONERS SHOULD HAVE ACCESS TO NORMAL ANTIDUMPING PROCEDURES IF THEY SO CHOOSE AND IF THE ANALYTICAL TOOLS OF ANTIDUMPING CAN IN FACT BE USED IN THE COUNTRY AND SECTOR INVOLVED.

I SEE NO POINT IN RESTRICTING IMPORTS UNLESS THEY ARE HURTING US, AND I THEREFORE FAVOR A PROVISION THAT AN 'ARTIFICIAL PRICING' REMEDY FOR TRADE PROBLEMS CAUSED BY NON-MARKET SUPPLIERS BE BASED ON A FINDING OF INJURY. AN INJURY TEST WILL MINIMIZE THE NUMBER OF DETERMINATIONS WHICH MUST BE MADE BY THOSE ADMINISTERING A NEW LAW IN THIS AREA, ENHANCING THE PREDICTABILITY AND SPEED OF EACH CASE.

OUR READING OF S. 958 AS NOW DRAFTED, HOWEVER, LEADS US TO BELIEVE THAT THERE WOULD BE NO INJURY TEST FOR 'ARTIFICIAL PRICING' INVESTIGATIONS, AND THAT THE PRESENT INJURY TEST REQUIRED IN ANTIDUMPING CASES WOULD BE DENIED TO COUNTRIES WHICH ARE NOT MEMBERS OF THE GATT ANTIDUMPING CODE. HOWEVER, SEVERAL NON-MARKET ECONOMY COUNTRIES ARE GATT MEMBERS BUT NOT CODE SIGNATORIES. THE GATT ITSELF REQUIRES THAT AN INJURY TEST BE PROVIDED TO ALL GATT MEMBERS IN ANTIDUMPING CASES.

IN ADDITION, THE U.S. HAS CONCLUDED BILATERAL COMMERCIAL AGREEMENTS WITH SEVERAL NON-MARKET ECONOMY COUNTRIES. THE HUNGARIAN AND ROMANIAN AGREEMENTS EXPRESSLY REAFFIRM THE GATT OBLIGATIONS OF THE PARTIES, AND THE CHINESE AGREEMENT ALSO PROVIDES THAT 'MOST FAVORED NATION' PRINCIPLES WILL APPLY TO U.S.-CHINA TRADE.

THE GATT RECOGNIZES THAT THE STANDARD PROCEDURES FOR ASSESSING DUMPING DUTIES MAY NOT BE APPLICABLE TO THE IMPORTS OF NON-MARKET ECONOMIES AND ALLOWS FOR SPECIAL PROCEDURES IN CASES INVOLVING SUCH ECONOMIES.

IF THE POINTS I HAVE JUST MENTIONED ARE TAKEN INTO ACCOUNT IN NEW LEGISLATION, IT WILL BE CONSISTENT WITH THE GATT RULES ON DUMPING, AND WE WILL EXPLAIN THE NEW LAW TO OUR TRADING PARTNERS IN THE CONTEXT OF THOSE RULES.

I WANT TO STRESS, HOWEVER, THAT IN URGING THAT S. 958 BE MADE CONSISTENT WITH THE GATT RULE WHICH REQUIRES A SHOWING OF INJURY IN ANTIDUMPING CASES, I AM NOT SUGGESTING ANY CHANGE IN THE STATUS QUO WITH REGARD TO INJURY IN CASES FILED UNDER OUR COUNTERVAILING DUTY STATUTE.

MR. CHAIRMAN, THAT CONCLUDES MY TESTIMONY. I'D BE HAPPY TO ANSWER ANY QUESTIONS YOU OR OTHER MEMBERS OF THE COMMITTEE MAY HAVE.

Senator **Danforth**. Senator Heinz.

Senator **Heinz**. Mr. Chairman, thank you. First, Senator Mitchell has a prepared statement he would like inserted to the record, and I ask unanimous consent that he be allowed not only to insert the statement but he wants to submit some questions to the witnesses as well.

[The prepared statement of Senator George Mitchell follows:]

A Statement by and a Question From Hon. George J. Mitchell, to the Administration Witnesses Concerning the Operation of the U.S. Antidumping and Countervailing Duty Laws as They Affect Small Businesses

I am concerned by recent cases that have come to my attention in which relatively small businesses in Maine have found it uneconomic to complain about what appears to be subsidized import competition and dumped imports for the reason that the expense of proceedings under the antidumping and countervailing duty laws as amended by the Trade Agreements Act of 1979 is beyond the possible benefit to them of a special dumping or countervailing duty that might be assessed.

Part of the reason for the expense of these proceedings is the extremely complicated and fast moving nature of title VII cases. Preliminary determinations amount almost to full scale investigations, and final determinations must be made in not less than 120 days. In addition, statutory criteria, adopted I recognize largely from language in the International Antidumping and Subsidies Codes, appears to require exhaustive investigations, even at the preliminary stages. Merely answering the questionnaires issued by the Government in such cases involves substantial costs, even if the petitioner does not actively litigate his complaints. Thus, notwithstanding the apparent willingness of both the International Trade Administration and the International Trade Commission to undertake affirmatively to investigate complaints by domestic petitioners, the costs of dumping investigations to small business have literally become prohibitive.

I am, therefore, seeking suggestions from both Senators and the Administration, as well as private industry, on ways to improve the accessibility of the U.S. antidumping and countervailing duty laws. I would appreciate, therefore, the Administration's responding in writing with suggestions on statutory changes that could be made to improve this accessibility, and I encourage the Administration and the Commission to undertake every possible simplification of the operation of these laws so that small business can obtain maximum access to this remedy.

DEPARTMENT OF STATE
Washington D.C. 20520

MAY 7 [illegible]

Dear Senator Bradley:

On January 29, 1982, the Subcommittee on International Trade of the Senate Finance Committee held a hearing on S. 958, a bill concerning trade with non-market economy (NME) countries. Harry Kopp, Deputy Assistant Secretary for Trade and Commercial Development at that time, presented the views of the State Department on the proposed legislation and the issue in general. Subsequent to the hearing, we received from your office a list of questions on issues related to the bill. We understand that the Department of Commerce has also been requested to respond to the same list of questions.

The principal concern of the State Department in this area is maintaining the integrity of our international obligations. However, the State Department retains a strong interest in the proposed legislation and in the question of applying the concepts of dumping and subsidization to the trading practices of non-market economy countries (NME's). We support the intent of S. 958 to reform the existing procedures in favor of ones that are simple to understand and easy to administer.

The following comments reflect the State Department's views on the general issues. Answers to specific questions are enclosed.

The US antidumping law is designed to foster fair international trade by nullifying the impact on a US industry of foreign price discrimination. Relief from unfair trade practices can be granted under the dumping legislation only when two conditions exist: sales at less than fair value, and material injury or threat thereof.

The Honorable,
Bill Bradley,
United States Senate.

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Implicit in the concept of "sales at less than fair value" are the notions that: a) true value can be determined; and b) the exporter can control the sales price of its product. Under the existing dumping procedures, experience has shown that neither of these assumptions holds true with regard to NME's. In many NME's, industry is subject to such a high degree of government intervention and direction that it is virtually impossible to determine the true value of prices or costs.

The current US practice of selecting a surrogate free-market producer for an NME producer prevents the exporter from selling at dumping prices. The exporter is instead vicariously subjected to the economic conditions and business practices of the surrogate chosen by the Department of Commerce. As a result, in many NME dumping cases, such as that involving Montan Wax from the German Democratic Republic, the dumping margin is measured according to conditions in the surrogate country (in this case, the FRG) -- conditions over which the exporter has no control and, quite often, little or no knowledge. This lack of certainty, which we consider the most serious flaw in the current system, is costly for a US producer, who cannot predict with any certainty the remedy available to him from the unfair trade practices of NME's, as well as for the NME exporter, who is unable to estimate with any certainty what sales price will be considered "fair" under US trade law.

The problem of establishing "fair value" is not endemic to all sectors nor countries which have traditionally fallen into the "non-market economy" category, and standard dumping and countervailing duty procedures can and should be pursued whenever there is evidence that NME business decisions are responding to market conditions. A standard antidumping or countervailing investigation is more manageable for NME exporters than a 'surrogate' investigation, since duties are assessed according to the NME's own costs of production rather than those of a surrogate.

In cases where dumping and countervail investigative methodology is meaningless, the artificial price system proposed by S. 958 appears to be a reasonable and uncomplicated approach to providing US producers with relief from the unfair pricing practices of non-market economies. It reduces uncertainty, in that US and foreign producers are cognizant of the lowest "free-market" sales prices in the US; and it continues to link the NME exporter to the behavior of market-oriented producers.

We believe relief in artificial pricing cases should be granted only where there is a finding of material injury. The provision of an injury test would promote free trade and foster competition by confining trade complaints against NMEs to those cases which actually affect us adversely. The fact that AD procedures will be substituted whenever possible also suggests that an injury test in artificial pricing cases is appropriate, since both the Antidumping Code and the GATT itself require an injury test in all dumping investigations, and several non-market economies are GATT members and/or Code signatories. In addition, the US has bilateral commitments with Hungary and Romania which expressly reaffirm the GATT obligations of both parties, and we have an agreement with the People's Republic of China which provides for "most-favored nation" status in bilateral US-China trade.

With cordial regards,

Sincerely,

Powell A. Moore
Assistant Secretary
for Congressional Relations

Enclosure:

As stated.

Attachment

Questions from Senator Bradley with Answers from the Department of State

Q. 1. The basic purpose of the antidumping law is to ensure that foreign goods are sold for use in the United States market generally at the same price as they are sold for use in the domestic market of the exporting country. Bearing this basic purpose in mind, wouldn't it make sense for the Commerce Department to determine a realistic exchange rate for each non-market country -- an exchange rate based on a purchasing power analysis such as the CIA regularly performs? Couldn't the purchasing power exchange rate then be used to compare the domestic price of the allegedly dumped goods, assuming that that price is not an unreasonably artificial one, with the export price?

A. 1. The purpose of US antidumping law is to promote fair international trade by offsetting price discrimination by foreign exporters. Dumping is found if the producer is selling at less than "fair value", and thereby causing material injury to a US competitor. Because production in non-market economies is directed by the government, with input availabilities, input prices, wages, etc., determined by the governments, exchange rate calculations cannot solve the problem of determining the true costs of production, i.e., the "fair value" of the product.

Q. 2. & 3. When an exporter from Eastern Europe or China is required to price his sales to the United States at the price of some third country exporter, particularly if this is the only third party exporter, doesn't this tend to promote an informal cartel between competing suppliers to the U.S. market? Where the only free-market producer of a non-market country product sold in the U.S. is its U.S. competitor, S. 958 would require the imported product to be sold at the U.S. producers' price. For example, I understand this to be the case concerning montan wax imported from East Germany, a case where the dumping margin originally found by the Commerce Department has "disappeared" due to changed economic conditions. I believe S. 958's rule in such cases would conflict with the recently published GAO report that recommended that a constructed value option should exist in U.S. law for cases in which no third-country producer exists. In your view where there is no third-country free-market producer, would application of the rule proposed under S. 958 create a monopoly price? Is it good policy to encourage monopoly prices with an antidumping law?

A. 2. & 3. We agree that there may be cases where there is only one U.S. producer and one foreign producer who is located in a non-market economy, and that raising the NME producer's price to the U.S. level might be anticompetitive and harmful to consumers. We favor special legislative or regulatory provisions to deal with such cases.

Q. 4. Do you think it is fair competition to use the price at which an advanced country sells a product in the U.S. as the surrogate for the "real" domestic price of that product in the non-market country? Should we treat some of non-market countries differently than others in this respect?

A. 4. Under the existing procedures, a surrogate is chosen whenever possible according to similar economic circumstances criteria. This is, however, a flawed approach, since no two economies are identical. In an artificial pricing system, we would prefer a duty which would bring the NME price up to the lowest average price charged in the marketplace regardless of the state of development of the producer selling at that price. We believe this system would be fairer for the NME producer than the current one because he would know the minimum acceptable price in the US and could manage his sales accordingly.

Q. 5. S. 958 provides at paragraph (C)(1)(A) that "whenever a non-market economy country which is the producer of an article which is the subject of an artificial pricing investigation under this section furnishes verifiable information to the administering authority in connection with such investigation which is sufficient, in the judgment of the administering authority, to permit the investigation to be conducted as a countervailing duty investigation or an antidumping duty investigation," etc., such an investigation will be undertaken. In your opinion, would a non-market country need to furnish not only cost and price information, but also evidence that goods are sold on a free market in the home country, that the currency of the non-market economy is convertible, and other information on the general operation of the non-market economy in order to qualify for such a judgement? Do you expect, for example, that under present circumstances any of the following countries could provide sufficient information to permit the use of home market or third-country prices for an antidumping investigation: East Germany, Poland, Hungary, the Soviet Union, the People's Republic of China?

A. 5. We believe those non-market economies and sectors that are responsive to market forces should be investigated according to standard antidumping procedures. The Department of Commerce is in the best position to develop criteria for making this decision.

Q. 6. Since: (1) present section 406 (which this bill seeks to replace) requires that actionable "market disruption" by a Communist country consists of imports increasing so rapidly as to be a significant cause of material injury or threat of material injury, to the US industry: and (2) the normal antidumping procedure, which this bill seeks to improve, provides that injury to a US industry must be shown, or the establishment of such an industry be materially retarded; then: (a) ought not any such proposed remedy be required to include the traditional showing of injury to the domestic US industry? If not, why not? (b) Is this not especially true as applied to those countries which are or become parties to the GATT antidumping agreement? How would we handle our treaty obligations to these countries if S. 958 became law?

A. 6. It is the State Department's position that any changes in our antidumping laws and procedures must be consistent with our international obligations. Our GATT membership and several bilateral trade agreements require the US to extend the injury test in antidumping investigations involving most of the non-market economies. However, there are several factors which argue for a universal injury test in artificial price investigations. First, artificial pricing investigations would replace section 406 procedures which are based on injury. Second, with an injury test in all cases, there would be no difficulty in switching from an artificial pricing to a dumping investigation should the circumstances permit, since the ITC would have begun an injury investigation at the same time Commerce initiated its own investigation. Third, American consumers could enjoy the benefits of low NME prices except if those prices were actually harming US producers.

Q. 7. In your view is the proposed definition of "non-market economy country" workable? The definition reads: "...any country the economy of which, as determined by the administering authority, operates on principles other than those of a free market to an extent that sales or offers of sale of merchandise in that country or to countries other than the United States do not reflect the fair value of merchandise." It appears tautological. Can such a test be applied reliably?

A. 7. The definition of non-market economy should be precise enough to allow a producer to predict with some certainty which trade laws apply to him. However, we oppose the compilation of a list of NME countries and believe the determination to pursue an artificial pricing rather than standard antidumping or countervailing duty investigation should be made on a case-by-case basis. The Commerce Department is more qualified to comment on the administrative "workability" of the proposed definition.

Q. 8. In your view, would the bill tend to encourage the People's Republic of China and the countries of Eastern Europe to move toward free market principles, or would it tend to discourage them by summarily placing them in "artificial pricing" category?

A. 8. The artificial pricing system proposed by S. 958 would probably have little effect on the economic conduct of NME's but, to the extent there would be any effect, the proposed system would tend to encourage rather than discourage a particular NME's movement toward free market principles. We believe this would occur since an NME producer who was highly competitive would be able to avoid artificial pricing duties by proving his competitiveness in terms of free market behavior.

Senator HEINZ. Second, Mr. Chairman, I ask unanimous consent that my full opening statement, which I, believe it or not, abbreviated, be placed in the record.

Senator DANFORTH. Without objection. I also have a prepared statement for the record.

Mr. Hathaway, you are here at the table as well, representing U.S.T.R. Do you also have a statement?

Mr. HATHAWAY. Yes, sir.

STATEMENT OF MICHAEL HATHAWAY, DEPUTY GENERAL COUNSEL, U.S. TRADE REPRESENTATIVE

Mr. HATHAWAY. Senator, I wanted to second what Under Secretary Olmer has said, and state that the U.S. Trade Representative's Office fully supports the objectives of the bill. So long as the legislation can be made consistent with our international obligations, particularly with regard to the injury test, we will be happy to work with the committee in making it a workable and successful piece of legislation. Because I think everybody knows well that this area has been a mess at least since the golf cart case, it is about time we got it fixed.

Senator HEINZ. As you, Secretary Olmer, described the adjustments you would like to see made, they nearly become a series of technical adjustments. There seem to be very minor substantive differences between what we are trying to accomplish and what you, I think, would like to see enacted. Is that a fair statement?

Mr. OLMER. Yes, sir, it is with the possible exception of the distance between us on the question of application of an injury test. I think it is fair to say that.

Senator HEINZ. Assuming that we can reach agreement on all of those issues, including the injury test, then I would assume that the administration would strongly support the bill. Is that correct?

Mr. OLMER. Absolutely.

Senator HEINZ. Would you agree or would the State Department agree?

Mr. KOPP. Sure.

Senator HEINZ. U.S.T.R?

Mr. HATHAWAY. Yes. We would agree with that.

Senator HEINZ. I compliment you on your good judgment. [Laughter.]

Let's take a minute, if we may to sharpen our focus on some of the things you did discuss.

Mr. Olmer, you proposed that there be no judicial review for the choice of the method of analysis. That's an interesting suggestion. I plan to ask our attorneys' panel about it. Do you believe that permitting such a review would substantially increase the time and expense of litigation?

Mr. OLMER. I think it would take away one of the positive features of the bill, which is making it less complex and more expeditious to pursue the case. I think it would be disruptive in terms of the time it would require, and for that reason, oppose it.

Senator HEINZ. Your proposal on change in the method of duty assessment suggests tilting the procedural focus of the bill away from countervailing duty procedures and toward dumping procedures. Is that your intent? And if so, why?

Mr. **Olmer**. Well, we are getting into some technical areas, Senator, that I would like to let the lawyers and the economists work at. I am not an economist. As I like to say, I am an honest man.

Senator **Heinz**. You are a lawyer. [Laughter.]

Mr. **Olmer**. That was selective in its application, Senator. The statutory time limits in a countervailing duty case, as you know, are shorter than those in an antidumping case. We think that those shorter time limits are adequate for an artificial pricing investigation because the analysis would be much shorter. That's the reason that we would favor that position.

Senator **Heinz**. Do you think the bill should contain explicit criteria for determining when a country is a nonmarket economy?

Mr. **Olmer**. I do not, sir, because I think it would, again, inject a complication that I don't, frankly, know how we would handle. I have seen efforts, in advance, to find what fits into the criteria of free country as opposed to nonfree. And I think that this would be the same order of difficulty or impossibility.

Senator **Heinz**. Do you think the administration could maintain a list of the nonmarket economies so as to avoid the necessity of a determination in each case?

Mr. **Olmer**. I think the risk would be so dynamic that it would be best to do it on an ad hoc basis. And we would be able to do it in sufficient time to satisfy petitioners as well as potential respondents.

Senator **Heinz**. Mr. Chairman, I want to thank our witnesses for noting their reservations, which I feel we can work out to both our satisfactions; and for their very strong support of the concepts. I think when all is said and done, it could be said that they will be very strong boosters of S. 958. And I appreciate their support. It is very, very helpful.

Senator **Danforth**. Thank you. Senator Long.

Senator **Long**. No questions.

Senator **Danforth**. Senator Byrd.

Senator **Byrd**. It appears to me to be a good bill.

Senator **Danforth**. Thank you, gentlemen.

The next witness is Frank C. Conahan, Director, International Division, U.S. General Accounting Office.

STATEMENT OF FRANK C. CONAHAN, DIRECTOR, INTERNATIONAL DIVISION, U.S. GENERAL ACCOUNTING OFFICE

Senator **Heinz**. Mr. Conahan, please proceed.

Mr. **Conahan**. Thank you, Mr. Chairman. Senators, we appreciate the opportunity to testify today on this bill. With me are two key members of our staff who have been working in this area for the past couple of years, Don Ingersoll and Sharon Chamberlain.

We agree that improvements in the current laws are warranted. In fact, in September of last year, we issued a report to the Congress entitled, "U.S. Laws and Regulations Applicable to Imports From Nonmarket Economies Could Be Improved." This report discusses how these laws and their regulations could be improved to make them more effective. I believe that the report is certainly consistent with the objectives of S. 958, though, in some respects, our approach differs. I would like to briefly comment on some of the major provisions of your bill and discuss our views on them.

We agree with S. 958 that prices and costs should be used when possible in dumping investigations. We believe, however, that an injury test should be part of the investigation regardless of whether the country involved has signed the Antidumping Code. This is for purposes of consistency with the way other countries are treated and to conform with article VI of GATT. We believe the method for calculating artificial pricing proposed in S. 958 is simpler and easier to administer than current methods. We support it.

We recommended essentially the same approach in our report. Exclusive reliance on this method, however, would not allow a nonmarket producer to demonstrate economic efficiencies that would justify pricing its product below that of other producers. We believe that a currently available method, which estimates the value of production factors, should be retained to deal with such situations. We don't believe that this would occur often but we believe that it should be provided for in the bill.

S. 958 seems to be silent with regard to an injury test in artificial pricing investigations. Therefore, the bill could be interpreted to mean no injury test would be required in such investigations. If this interpretation is correct, U.S. importers and consumers of nonmarket economy products could be adversely affected. We believe it should be clarified. And I suppose we come out on the side of an injury test.

S. 958 would apply the provisions of countervailing duty law with regard to suspensions of investigations. This would provide greater flexibility to suspend artificial pricing investigations than does U.S. antidumping law, in that it would permit use of quotas as a basis for suspension, a method considered by some to be more anticompetitive than price adjustments, and a method not currently available under the antidumping statutes.

In our report, we recommended two other options for suspending dumping cases, which do not use quotas, and we would be happy to discuss the details of them later if you so choose.

Finally, S. 958 would repeal the existing section 406 of the Trade Act of 1974. In our study, we found that section 406 has been little used, no relief has been granted as a result of it, and essentially the same protection is available through other means. Moreover, U.S. Government agencies, as well as some businesses, believe that section 406 is discouraging desirable trade. If the subcommittee concludes that section 406 is discouraging trade, we believe it could be repealed without significantly increasing the risk to U.S. producers. That is supported in our report.

That pretty much catalogs our comments on the main features of the bill. We would be happy to answer any questions.

Senator DANFORTH. Senator Heinz.

Senator HEINZ. Thank you, Mr. Chairman. You suggest that we should extend the injury test to all of the cases that might come under S. 958. Is that correct?

Mr. CONAHAN. We believe that the current provisions of the dumping laws should be used when actual prices or costs are used.

Senator HEINZ. Now under our subsidies laws, we say that when a country is subsidizing its exports or its domestic subsidies result in a subsidization of those exports that only those countries that have signed the subsidies code are entitled to an injury test. Those countries that do not sign the subsidies code are not entitled to an injury test. Why should we, in the case of a nonmarket economy that is, in effect, through one mechanism or another, subsidizing its exports to this country, and which have not signed the subsidies code, be entitled to an injury test when we do not grant such an injury test to countries—the less developed countries—that are nondeveloped market economy countries that are not signatories to the code? Isn't that letting countries like the Soviet Union have a free ride compared to countries like Bangladesh and Sri Lanka?

Mr. CONAHAN. I think that our rationale stems from the fact that under your proposed bill, sir, you have a situation which is neither under traditional rules a dumping case nor under traditional rules a subsidy case or perhaps it is either or both. So we are dealing with something new.

Moreover, most of these countries are not in a position to really comply with the subsidies code. So, in effect, there is no way that there would ever be an injury test involved.

Senator HEINZ. May I interrupt you to say that this legislation does not compel any nonmarket economy to go through a procedure—does not compel it to go through a procedure—where they are not going to have the benefit of an injury test. The way for a nonmarket economy to avoid being treated without an injury test is for them to come forward with accurate data, at which point they will then be treated, according to our laws under antidumping or countervailing, whichever is appropriate. Why should we not demand accurate data from these countries? Because it seems to me what you are saying is if we give them an injury test—in every instance, there will be no incentive for them to come forward with the information that we have to have to really make an accurate and, for all parties, fair determination.

Mr. CONAHAN. I feel that one of the means for getting these countries closer to the way that we would like them to act in the market is for there to be some greater interaction between them and us on the trade scene. I think that we have seen this in the case of some of the Eastern European countries, that they have been trying hard to move in that direction. An injury test would, I think, enhance rather than detract from the opportunities for increasing trade with these countries.

Senator HEINZ. I don't think you have answered the question. The question is: What course of action will make it easier for us to get information so we can make valid antidumping or countervailing duty determinations, as the case may be?

Now what I am saying is that if we say to people, look, you will get an injury test if you will come forward with data so that we can go forward under antidumping procedures, but we can't guarantee anything. In fact, we could pretty much guarantee you no injury test if, as in the case of Polish golf carts, they would never tell us what the true cost, prices, or exchange rates were. And as a result, the Commerce Department had to go and pick a country, Spain; kind of reconstruct from the example of Spain what they thought might be going on in Poland. And let me tell you that is a very tenuous and attenuated analysis.

Mr. CONAHAN. Well, I certainly agree with that, Senator. And we support your proposal in that regard.

Senator HEINZ. I understand that. As a matter of fact, your report was extremely helpful to us. And we have drawn liberally or conservatively, as the case may be, from it. But I think the issue of when an injury test is or isn't appropriate and the debate on both sides of that issue need to be put on the record. That's what we have done here.

As I understand your testimony, you basically support the thrust of the bill with that and one other thing.

Mr. CONAHAN. Yes, sir. We do.

Senator HEINZ. Thank you, very much.

[The prepared statement follows:]

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

FOR RELEASE ON DELIVERY
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STATEMENT OF

FRANK C. CONAHAN
DIRECTOR, INTERNATIONAL
DIVISION

U.S. GENERAL ACCOUNTING OFFICE

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL TRADE

SENATE COMMITTEE ON FINANCE

ON

S. 958, A BILL TO PROVIDE A SPECIAL REMEDY FOR THE ARTIFICIAL PRICING OF ARTICLES PRODUCED BY NONMARKET ECONOMY COUNTRIES

Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to testify before you today on S. 958, a bill that would change U.S. import laws as applied to products from nonmarket economies. We agree that improvements in this area are warranted. In our recently issued report, "U.S. Laws and Regulations Applicable To Imports From Nonmarket Economies Could Be Improved" (ID-81-35), we identified several weaknesses in current U.S. laws and procedures.

We believe that certain changes proposed in S. 958 would contribute to alleviating some of the problems discussed in our report; however, some features of the bill could lead to problems. I would like to comment on the major provisions of S. 958.

First, S. 958 would explicitly retain as a basic option in dumping and countervailing duty cases the use, when possible, of the actual prices or costs of a nonmarket producer. This would be permitted when the nonmarket producer furnishes verifiable information sufficient to allow a "normal" dumping or countervailing duty investigation--in other words, when the prices or costs adequately reflect market forces.

We agree that nonmarket economy prices or costs should be used when possible, although we believe the likelihood of actually doing so is very limited.

S. 958 also stipulates, however, that even when nonmarket economy enterprises' actual prices or costs are used in a dumping investigation, that investigation will not require a test of injury to domestic industry unless the nonmarket economy in question is a party to the Agreement on Implementation of Article VI of the GATT (relating to antidumping measures). This is not consistent with the way other countries are treated. Market economy countries receive an injury test whether or not they are signatories of the Antidumping Code. If this provision of S. 958 is enacted, nonmarket countries, such as the People's Republic of China, that have not signed the Code would not receive an injury test. This change could encourage the initiation of investigations involving products from nonmarket countries, and adversely affect trade with countries with which the United States wishes to trade for economic and foreign policy reasons.

When actual prices or costs of a nonmarket producer cannot be used in an antidumping or countervail investigation, S. 958 would replace the existing procedures with what is called in the bill an "artificial pricing investigation." The extent to which a nonmarket economy product is artificially priced would be calculated with reference to the lowest prices actually charged in the United States by free-market producers of like articles. Any nonmarket economy product that is the subject of an investigation would be considered unfairly priced if priced below the lowest priced equivalent market economy product.

We believe that the method for calculating artificial pricing of nonmarket economy products proposed in S. 958 (an approach essentially the same as one we recommend in our report) is simpler and would be easier to administer than the methods currently used by the Commerce Department to establish dumping and would substantially ameliorate the problems in administering current law.

It should be noted, however, that exclusive reliance on this method of pricing would not allow a nonmarket producer to demonstrate economic efficiencies that would justify pricing its product below that of other producers. A pricing method is currently available in certain circumstances to provide nonmarket producers the opportunity to demonstrate such efficiencies. We believe that this method should be available as an option in any artificial pricing investigation. This method estimates production costs by taking the actual production factors (e.g., labor hours, energy, raw materials, etc.) used by a nonmarket economy producer in making the product under investigation and valuing them at the prices prevailing in the most comparable market economy. To use this option, the nonmarket economy producer must provide for and be willing to allow the Commerce Department to verify the types and quantities of production factors used.

Although there are elements of difficulty and expense in this method and the outcome would not be a precise measure of economic efficiency, we believe this method is a fair way to permit a nonmarket economy producer to attempt to show it has economic efficiencies.

S. 958 is silent regarding an injury test in artificial pricing investigations and therefore could be interpreted to mean no injury tests will be required in such investigations. If this is what is intended by the bill, nonmarket economy products which are found to be unfairly priced under the bill's artificial pricing standard would be subject to duties regardless of whether a domestic industry is being injured by reason of those imports. This could adversely affect U.S. importers and domestic consumers of those products. It could also discourage or disrupt trade with countries with which the United States wishes to trade.

S. 958 also stipulates that artificial pricing cases will in many respects conform to the provisions of existing countervailing duty law. This would provide greater flexibility to suspend artificial pricing investigations than does U.S. antidumping law. Countervailing duty law permits the suspension of investigations based on quotas or price adjustments; dumping law does not allow the use of quotas.

We found the methods provided in the antidumping law to be very difficult to apply in nonmarket economy cases, and consequently we support in principle changes that would improve the administration's ability to suspend investigations. We believe, however, that the Subcommittee should be aware that the use of quotas is considered by some to be more anticompetitive than suspensions based on price adjustments.

Finally, S. 958 would repeal the existing market disruption provision (section 406) of the Trade Act of 1974. In our report, we noted that domestic industry has been granted no relief under section 406 and that essentially the same protection is available through other means (such as sections 201-203 of the Trade Act of 1974 and section 232 of the Trade Expansion Act of 1962). Moreover, some agencies and U.S. businesses believe section 406 may be discouraging desirable trade.

We did not attempt to determine the specific effect of section 406 on trade. If, however, the Subcommittee believes section 406 is discouraging desired trade, it could be repealed without significantly increasing the risk to U.S. producers.

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We hope our testimony and report will be useful to you in your deliberations, and we would be pleased to work with the Subcommittee in developing legislative language. In that connection, I believe that some of the specific recommendations in our report would achieve the key objectives of S. 958 without creating the problems I have discussed today. This concludes my prepared statement and we welcome questions you or Members of the Subcommittee may have.

Senator DANFORTH. The next panel is Richard Cunningham, Carl Schwarz, and Charles Verrill. Mr. Cunningham.

STATEMENT OF RICHARD O. CUNNINGHAM, STEPTOE & JOHNSON, WASHINGTON, D.C.

Mr. CUNNINGHAM. Good morning, Mr. Chairman, members of the committee. My name is Richard Cunningham. I am a member of the law firm of Steptoe & Johnson, Chartered. I still feel awkward saying "chartered." We just incorporated and I am not yet sure what that new word means.

I am here today to speak in support of S. 958 on behalf of two American companies which have had extensive and extremely disillusioning experiences with the present laws dealing with imports from nonmarket economies. It is particularly significant, I think, that these two companies, Occidental Petroleum Corp., and Harley-Davidson Motor Co., have dealt with the present laws from opposite sides of the fence. Occidental is an importer of Russian ammonia and was a respondent in the largest section 406 case ever brought. Harley-Davidson is an American producer of electric golf cars, and thus was on the petitioner's side in what was perhaps the most celebrated of all nonmarket economy dumping cases, the case of electric golf cars from Poland.

Yet both of these companies, despite the fact that they come at this issue from opposite points of view, are thoroughly disillusioned with present law. And both support the approach taken in Senator Heinz's legislation. The reason is that our laws in this area are now in the worst possible state. They do not provide relief for U.S. industries. But their ambiguity, unpredictability, and intensely political nature make it very difficult for foreign exporters to know how to price their sales fairly or for U.S. companies to do business with nonmarket countries.

Mr. Chairman, consider, if you will, the current posture of these laws. Section 406 has proven to be entirely political and completely ineffectual. In 7 years, the batting average of U.S. industries under that law is a flat zero. The countervailing duty law is, in practice if not in theory, inapplicable to nonmarket economy imports. And the antidumping law as it has been applied to these countries at least since 1978—well, I can only use the phrase that nearly all observers are using, it's simply "Alice in Wonderland." It is unrealistic; it is extremely vulnerable to political pressure. And I defy anyone to predict at the start of any nonmarket economy dumping case what the outcome of that case is going to be.

My written testimony presents two case histories under these laws. They are, I think, the two most significant cases in the area—Anhydrous Ammonia from the U.S.S.R., under section 406, and electric golf carts from Poland, under the antidumping law. I don't propose to go through these case histories today. I had to live through both of them, and believe me, once was more than enough.

Let me instead summarize the lessons which I draw from those cases. And then I will explain why I, Occidental Petroleum and Harley-Davidson strongly support the artificial pricing approach of Senator Heinz's legislation.

First, as to section 406. The thrust of my testimony is that a miniescape clause for Communist countries just hasn't worked. The reason it hasn't worked is that a proceeding which gives the executive branch discretion as to whether or not to limit imports from Communist countries ceases to be a trade statute and becomes a political statute. If I ever doubted that this was the case, those doubts were eliminated by the repeated twists and turns of the Russian ammonia case.

First, the ITC found market disruption. Then, the President, in a very strongly worded message, denied relief. Less than a month later, the Russians had gone into Afghanistan and the President completely turned around and not only ordered that a new investigation be commenced, but imposed emergency relief where less than a month before he had been saying that no economic grounds for relief existed whatsoever. And then, most ironically of all, the ITC ended the whole case by reversing its position, and finding no market disruption. We can't call something like this a trade proceeding. It's a political proceeding. If we want to impose sanctions, we ought to have a sanctions statute and not do it by trade statutes.

The antidumping law is no better at the present time. I agree entirely with the comments of Under Secretary Olmer. It is unworkable. It is unpredictable. But I would add also that it, too, is subject to political pressures. The testimony that I have laid out in written form documents with respect to the Polish golf car case just how political that became and on what political grounds the decisions were reached. Again, this is not the way to run a trade policy.

In short, both of these statutes need work. And I support the Senator's bill. It is workable. It is predictable. And it attacks the right problem. That is, the problem of unfair pricing.

The one reservation that I have is the one also expressed by the Under Secretary. And that is as to the injury test. I don't think, as a lawyer, that the keying of an injury test in all artificial pricing cases to signing the subsidies code is, as they say, "GATT-able." Because you are rolling antidumping and countervail into the artificial pricing test here. Nor do I think it is wise. This should be a fair bill. It should be a bill which does not require Communist countries to do something that in most cases they simply can't do.

With that one reservation I and the two companies that I am appearing for today very strongly support this legislation.

[The prepared statement follows:]

STATEMENT OF RICHARD O. CUNNINGHAM ON BEHALF OF OCCIDENTAL PETROLEUM CORP., AND HARLEY-DAVIDSON MOTOR CO.

My name is Richard O. Cunningham. I am a member of the law firm of Steptoe & Johnson, Chartered. I am appearing on behalf of two clients of the firm -- Occidental Petroleum Corporation and Harley-Davidson Motor Company.

Over the last several years, both Occidental and Harley-Davidson have had extensive experience with the U.S. laws dealing with trade with nonmarket economy countries. Occidental, which imports ammonia from the Soviet Union as part of a major fertilizer countertrade agreement, defended the largest proceeding ever brought under section 406 of the Trade Act of 1974 -- Anhydrous Ammonia from the U.S.S.R. Harley-Davidson, as a U.S. producer of golf cars, was active in what may be the best known of all nonmarket economy antidumping cases -- Electric Golf Cars from Poland. Although these two companies have been involved with the nonmarket economy trade from opposite points of view -- Occidental as an importer/respondent and Harley-Davidson as a U.S. producer and petitioner for import relief -- they have reached the same conclusions. Reform of these laws is badly needed, and the approach represented by S. 958 constitutes an important step in the right direction.

Both section 406 and the present provisions in the antidumping law and regulations dealing with trade with nonmarket economy countries are in major need of reform. S. 958, proposed by Senator Heinz, should be adopted to accomplish such reform. The present statutory mechanisms are unworkable and yield wholly unpredictable results. They provide neither an adequate vehicle for U.S. industries to obtain relief nor meaningful guidance to U.S. businesses that wish to trade with nonmarket economy countries.

The important virtue of the Heinz bill is that it sets forth a clear, objective standard for determining whether relief from nonmarket economy imports is appropriate. It provides what current law lacks: guidance for U.S. businessmen as to when a viable case can be brought and as to how trade agreements should be structured. It has the further benefit of enabling nonmarket economy exporters to understand clearly the rules that apply to U.S. trade with their countries.

My testimony today will discuss some of the special problems posed by trade with nonmarket economy countries and will analyze in some detail - with specific examples from the experiences of Occidental and Harley-Davidson - the inadequacy of present U.S. laws in dealing with those problems. Finally, I will discuss the ways in which S. 958 would deal more fairly and effectively with the probelms of this important but difficult trade area.

I. THE SPECIAL PROBLEMS OF TRADE WITH NONMARKET ECONOMIES

Trade with nonmarket economies is neither inherently undesirable, nor something that should be discouraged. Rather, such trade offers potential economic and political benefits for the United States, provided we recognize and deal both fairly and objectively with certain problems and risks inherent in that trade. Those problems and risks can be grouped into two basic categories:

- First, the risk that the nonmarket economy government may engage in deliberate and predatory practices aimed at markets or industries in the United States.
- Second, the possibility that the normal operation of the nonmarket economy may confer upon its exporters certain "artifical" advantages -- "artifical" in the sense that such benefits are not available to U.S. firms which must compete against imports from the nonmarket producers.

The danger of predatory practices in exports to the United States by nonmarket economies was dealt with at considerable length in this Subcommittee's Report on Section 406 of the Trade Act of 1974. In that report, the Subcommittee expressed concern about two possible types of predatory export practices:

First, it was pointed out that the government's control of the factors of production in a nonmarket economy gives that government the ability, if it so chooses, to marshall the resources of that economy rapidly and to concentrate them on a flooding of an export target market, with the resultant destruction of the domestic industry in the target country. I must confess, however, that I would be hard-put to cite a specific instance in which such a flooding of a United States market has occurred. Be that as it may, there are ample weapons in the arsenal of U.S. trade laws, even apart from the present section 406, which are capable of dealing with such a threat if it should materialize. These include the National Security Amendment, the Escape Clause, and the "critical circumstances" provisions of the antidumping and countervailing duties laws (which would also be applicable to a proceeding challenging "artificial pricing" under the legislation now being considered by this Subcommittee). These latter "critical circumstances" provisions are particularly important in dealing with the threat of a "flooding" of a U.S. market, since these provisions appear in our statutes dealing with unfairly low import pricing. I doubt very much that a "flooding" would ever occur -- or indeed could ever occur -- unless the flooding were accomplished by means of unfairly low export pricing.

This brings me to the second danger foreseen in the Subcommittee's report on section 406. A nonmarket economy exporter, the report noted, is not governed by the same profit motivation as are its U.S. competitors. Accordingly, the potential exists for the nonmarket exporter to sell into the United States at unreasonably low prices that bear no relationship to realistic costs for the purpose of putting its U.S. competitors out of business or dominating U.S. markets. If there is a real threat of predatory practices by nonmarket exporters, it seems to me that the threat lies in the area of unrealistic pricing, rather than solely in the area of volume of imports.

Moreover, the problem of unrealistic pricing of nonmarket economy imports goes beyond those instances where such pricing would arise from predatory motivation. Much more frequent is the situation where the normal, everyday operation of the nonmarket economy may produce export prices that are artificially low. In a nonmarket economy, numerous factors may operate to bring about this result. For example, there is the previously-mentioned absence of a profit motivation for nonmarket economy firms. The government of the nonmarket country may desire exports as a means of maintaining or increasing employment levels, or of earning hard currency to buy needed imports.

Even where nonmarket economy firms seek profits, moreover, their cost structure may be unrealistically low because of the intervention of the government in the economy. Wages, or perhaps the cost of raw materials, may be priced by the state at unrealistically low levels. Energy prices are another major cost factor which may be kept artificially low by the state. In addition, the influence of state planning may result in the construction of manufacturing facilities that are much more highly automated than could be justified in a market economy with the same low labor costs. For all of these reasons, U.S. producers may legitimately complain that the prices charged for imports from the nonmarket economy are artificially low because they are not based upon the same free market considerations with which a U.S. producer must deal.

The true nature of the problem with which the United States must deal in trading with nonmarket economies is pricing -- the fact that those economies operate in a different manner from ours, a manner which can produce artificially or unrealistic low prices. What is needed is a statute that governs pricing conduct in imports from such countries. Any such statute should satisfy the following requirements:

1. It should establish pricing criteria that are clear and objective, so the foreign exporter knows how to price its U.S. sales and the affected U.S. industry knows when it does or does not have a meritorious case to bring.

2. It should be nondiscretionary, so the results of trade proceedings will be determined on the merits, and not by domestic or international political considerations.

3. It should be administerable. The pricing standard should be constructed in a manner that it can be investigated and determined by the administering authority within a reasonable time period, using the resources available to the administering authority, and with a high degree of confidence the results obtained in that investigation will be accurate.

4. Finally, it should be a standard which, while ensuring against artificial pricing, will not in itself be an "artificial" standard. It should be based upon real world considerations, and it should not be a standard that will automatically exclude nonmarket imports from the United States.

I support S. 958 because it meets these criteria. As discussed below, neither the present section 406 nor current application of the antidumping law to nonmarket economies meets these tests.

II. INADEQUACY OF PRESENT U.S. LAWS TO DEAL WITH TRADE FROM NONMARKET ECONOMY COUNTRIES

A. Section 406

While section 406 of the Trade Act of 1974 was enacted to provide an additional mechanism for relief to domestic industries if rapidly increasing imports from Communist countries disrupt domestic markets, no relief has been granted in the six-year history of that provision. Section 406 has been equally unhelpful to U.S. importers, because neither the statutory provisions nor the ITC decisions under section 406 set forth any standards to enable the importer to know that its transactions with nonmarket economy countries comply with U.S. trade laws. Finally, proceedings under section 406 are very unpredictable, extremely costly, and are heavily influenced by political and international policy considerations purportedly outside the scope of the statute.

To illustrate these serious problems with section 406, I would like to discuss briefly the section 406 proceedings involving anhydrous ammonia imports from the Soviet Union. After representing Occidental Petroleum Corporation, the importer in those proceedings, I am all too familiar with the vicissitudes of section 406 litigation.

The ammonia imports at issue were part of a long-term fertilizer counterpurchase agreement entered into by Occidental and the Soviet Union in 1973. The agreement generally provides that, over a twenty-year period beginning in 1978, Occidental is to export superphosphoric acid in return for an equivalent value of ammonia, urea and potash. At its inception, the agreement was thoroughly reviewed and approved at the highest levels of the U.S. Government, and was even endorsed by the President.

Occidental took pains to implement the agreement in ways which would not disrupt the U.S. ammonia market. The Occidental-U.S.S.R agreement calls for the importation of steady quantities of ammonia, which were to increase over an initial five-year period and then level off. Over the life of the agreement, those quantities would reach a maximum level of about 10% of U.S. consumption in the mid-80's, after which the percentage would decline as imports levelled off and U.S. consumption continued to increase. I might add parenthetically that the U.S. ammonia producers themselves forecast that in all future years U.S. exports would exceed the volume of imports from the U.S.S.R. Nor could it be argued that the import pricing has been disruptive. Occidental's prices have remained at or above prevailing market prices, and the Soviet ammonia has been sold by Occidental to customers that would not have purchased from domestic ammonia producers in any event.

Despite these efforts, in 1979 -- more than five years after the Occidental-U.S.S.R agreement was endorsed by the U.S. government -- the ammonia imports pursuant to this agreement were challenged under section 406. In October 1979, a divided International Trade Commission determined that the Soviet imports posed a threat of material injury and recommended that a three-year quota be imposed. In December 1979, President Carter rejected the ITC's recommendation and determined that import relief was not in the national economic interest.

Only one month later, following the Soviet invasion of Afghanistan, the President, stating that recent events had altered international economic conditions, reversed this decision. He even went so far as to exercise his emergency authority under section 406 to impose a one-year quota and to initiate a new ITC investigation.

In this second investigation, however, the ITC, by a 3-2 vote, found no injury, thus terminating the temporary quota imposed by the President. At last, after three 180-degree reversals in less than a year, the case was over.

I respectfully submit that the Russian Ammonia case is a sorry chapter in the annals of U.S. trade law. Tremendous legal fees were incurred on both sides, yet everyone came away thoroughly dissatisfied -- indeed, the better word would be "disillusioned." The petitioning ammonia producers got no relief at all. Occidental, on the other hand, saw its $20 billion dollar trade agreement brought to the brink of dissolution -- not just once, but twice in less than a year.

Yet I would also submit that this case was not unique, but only somewhat more extreme than other follies under this statute. The Russian Ammonia proceedings, in the last analysis, were plagued by two flaws inherent in section 406:

First, this case dramatizes the impracticality of dealing with Communist country imports by means of a law which makes the ultimate decision discretionary. The fact of life is that politics and diplomacy overwhelm economics and trade policy where discretionary decisions are made on Communist country imports. Only the most naive observer could have believed that President Carter's complete reversal of his December 1979 decision not to limit Russian ammonia imports -- a reversal which occurred only a month later -- had anything whatsoever to do with changed economic circumstances. The fact is that his decision had no relevance at all to any issue under section 406. The Soviet Union had invaded Afghanistan. The Administration was under intense pressure to take retaliatory action. And the storm of congressional demands for such action convinced the Administration that a congressional override of the President's December decision was imminent.

Nor is the Russian Ammonia case unique in terms of the result being influenced by diplomatic considerations. In Clothespins from the People's Republic of China, the ITC unanimously recommended import relief. But this came at a time of major diplomatic emphasis on strengthening ties between this country and the PRC. It was not surprising, therefore, that the President rejected the Commission's report in favor of a more diplomatically palatable section 201 proceeding.

This is not the way to decide trade relief cases. If the President feels that economic sanctions are necessary for diplomatic reasons, he should invoke the National Security

Amendment rather than pretend to apply section 406. Yet as long as discretionary trade relief laws are available, the reality is that the Executive Branch will twist those cases to serve diplomatic ends rather than their true statutory goals.

The second failing of section 406 which was dramatized by Russian Ammonia was the absence of a meaningful standard. In this regard, the initial affirmative determination of market disruption by the ITC struck me at the time as truly remarkable, particularly when considered in light of the history and nature of the Occidental-U.S.S.R. agreement and the purported purpose of section 406. If such imports -- which were part of a long-term agreement that received prior approval of the U.S. government, were marketed in a nondisruptive manner, and involved steady but relatively modest quantities of ammonia -- can be found to cause market disruption under section 406, it is hard to conceive of a means of structuring trade with Communist countries that would be insulated from a successful section 406 challenge. Surely, these ammonia imports do not raise the spectre of a sudden "flooding" of the market or the "overdependence" against which section 406 was designed to protect.

At one point during the case, in one of my gloomier moments, I asked myself: How would one advise a client who wanted to structure a trade agreement with a Communist country in a way as to comply with U.S. law and insulate himself against import restrictions? I came up with the following list of recommendations:

-- Have the agreement reviewed in advance by all relevant U.S. agencies.
-- Obtain the approval of all relevant agencies.
-- If possible, get the endorsement of the President himself.
-- Sell the imported product consistently at or above U.S. market prices.
-- Look for customers who, because of their peculiar situations, need an offshore source of supply and would not in any event buy from U.S. producers.

The problem is that Occidental did all of this. Yet its agreement still came within inches of being destroyed by a section 406 case. There must be a better way of dealing with nonmarket economy imports.

In summary, the Russian Ammonia cases demonstrated that proceedings under section 406 are extremely unpredictable, subjective and extraordinarily influenced by foreign policy considerations. Moreover, these very costly proceedings have never provided any relief to domestic producers, while at the same time they have made U.S. companies wary of entering into legitimate transactions with nonmarket economy countries. Section 406 should be repealed.

B. The Antidumping Law

The antidumping law, as currently applied to state-controlled economies, is neither fair nor effective in dealing with the unique problems posed by trade with such countries. The methodology for determining fair market value set forth in the present regulations is ambiguous, vague and impractical in concept. The result is that the law is difficult to administer, provides no guidance to the U.S. businesses seeking to structure trade with nonmarket economy countries, and enables the administering authority to reach whatever result it wishes in any given case.

The current methodology for determining fair value departs sharply from the traditional (pre-1978) practice of the Treasury Department. Instead of looking to the distorted prices or costs of the producer in the nonmarket economy, Treasury prior to 1978 determined foreign value based on the prices or costs of the free-market producer most similar to the nonmarket economy producer in terms of items produced, degree of technological sophistication, and volume of production.

The current regulation rejects this "comparable producer" test and seeks to determine prices or costs based on those in a nonmarket third country which is deemed to be at "a level of economic development" comparable to the nonmarket economy. The only guidance in the regulation for identifying such a country is that comparability is to be determined by "generally recognized criteria, including per capita gross national product and infrastructure development."

The hierarchy of approaches to be used to determine fair value is by no means clear from the regulation. Apparently, if no comparable country can be identified, the prices or constructed value are to be determined from another market-economy country, "suitably adjusted for known differences in the costs of material and labor." If, however, a comparable country can be identified but similar merchandise to that under investigation is not produced there, a constructed value approach based on hypothetical costs of production is to be employed.

Apart from the ambiguity of the regulation, it provides no objective standards by which a "comparable country" is to be selected and thus allows the administering authority unfettered discretion in making that determination. As the experience of Harley-Davidson in the celebrated Polish Golf Car case demonstrates, because there are no objective guidelines, cases become subject to diplomatic pressures which can determine the outcome of the case. In its initial 1975 investigation of Polish golf car imports, Treasury used the procedure then required by its regulations -- comparing the U.S. prices of Polish golf cars with the Canadian prices of golf cars produced in Canada. The result was a determination of consistent dumping, with substantial dumping margins. Almost immediately, the Polish government and the State Department began to protest that the statutory method was unnecessarily harsh, and another method should be found. The situation was complicated -- to the Poles' advantage -- when the Canadian manufacturer went bankrupt, necessitating a search for another free-market third country producer. The results, as described in a memorandum of November 29, 1977 from the Commissioner of

Customs to the General Counsel of the Treasury Department, were as follows:

> The State Department has conducted a survey in an attempt to find a third country in which the selling prices of golf cars would be lower than the prices in Canada (which we have used in the past) or the United States. The results of this survey are not terribly conclusive, but are summarized as follows:
>
> Italy - $3,000
> Japan - $2,850
> United Kingdom - $2,328 (uses Polish chassis)
> Germany - $2,635
> South Africa - $3,680
>
> The current price being charged by a United States manufacturer of golf cars closely similar to those produced in Poland is approximately $1,400.

I must say that I find it rather strange that the State Department would set out to conduct a survey for the specific purpose of finding foreign prices which "would be lower than the prices in Canada ... or the United States" and would thus result in dumping computations which would allow the Polish manufacturer to undercut again the prices of U.S. producers.

At any rate, the Treasury Department rejected the use of any of these third country prices found by the State Department. It explained that the volume of sales in these third countries was insufficient to provide a basis for determining "fair value" -- ignoring the fact that, in at least one and perhaps two third countries, the volume of sales was greater than the volume of Canadian sales upon which the initial finding of dumping had been predicated. Treasury ultimately utilized the hypothetical cost approach adopted in the current regulation, with the result that no dumping was found.

Not only does the vagueness in the regulation increase the likelihood of influence from foreign governments, but the effect of the "comparable country" methodology in the regulation is to affirmatively favor importers from nonmarket economy countries. The reason that the methodology in the regulation has this effect requires a bit of explanation. The country where you will find an exporter comparable in size and sophistication to the Communist exporter is likely to be a country that is more advanced -- and therefore where prices are higher -- than a country "comparable in terms of economic development" to the Communist country. The reason is that the Communist country government often creates an exporter which is larger and more sophisticated than one would normally expect to find in that country. The goal is to earn hard currency by increasing exports, and therefore the government wants as large and as sophisticated a producer as possible. In a free-market economy comparable in economic development to the Coummunist country, on the other hand, producers would tend to be smaller and less sophisticated, both because the size of the domestic market would not justify a large-scale producer and because low labor rates would make a high degree of automation unnecessary.

Thus, what Commerce relies upon under this regulation is not the normal prices and costs which would exist if the exporter were located in a non-state controlled economy country. Instead, Commerce uses the significantly lower prices which prevail in a country where the exporter in question would not normally be located. The net effect of this is to produce a price comparison which is more beneficial for the exporter -- more beneficial precisely because of the involvement of the government.

The second approach in the regulation, which is to be applied when a comparable country cannot be identified, ignores the economic realities of the nonmarket system. Under this approach, nonmarket third country prices are to be adjusted for *known* cost differences from the nonmarket economy production. This is impossible to apply for the same reason that the traditional antidumping analysis cannot apply to imports from nonmarket economy countries. Because of cost distortions due to government involvement in the activities of the nonmarket economy producer, its true costs are not known.

The hypothetical cost analysis required by the present regulation for determining constructed value is equally unworkable and illogical. Under the regulation, constructed value is based on the costs of producing the merchandise in a "non-state-controlled-economy country determined to be reasonably comparable in economic development" to the state-controlled-economy country if the specific "objective components or factors of production" incurred in producing the merchandise in the latter country were used. In other words, constructed value is based on "objective components or factors of production" valued in the surrogate country.

In addition to the obvious difficulties in applying this analysis, the analysis itself is fundamentally flawed. It is based on the incorrect assumption that the supply and demand and relative scarcity of the various cost components in the surrogate and state-controlled-economy countries are identical. Indeed, precisely because of the cost distortions due to government intervention in state-controlled-economy countries, the relative costs of components are not likely to be the same.

In summary, the antidumping provisions applicable to state-controlled-economy countries are simply unworkable. Because of the vagueness of the law, the cases are increasingly vulnerable to diplomatic pressures which tend to influence greatly the outcome of the cases. While the vagueness and the current methodology inure to the detriment of the domestic producer, it also prevents the U.S. business community from knowing how to structure agreements with nonmarket economy countries so that they will be relatively safe from successful prosecution under the antidumping law. A new approach is badly needed.

III. S.958 SHOULD BE ADOPTED

S.958 offers an objective standard which is tailored to the particular problems of trade with state-controlled-economy countries and it avoids the problems experienced under section 406 and the antidumping law. It provides guidance to both foreign exporters and the U.S. industry and would be easy to administer.

The "pricing" approach of S.958 is the correct one, because the greatest potential threat from imports from nonmarket economy countries would arise from artificially low pricing of imports. The bill provides that artificially low priced imports, defined as imports from a nonmarket economy country at prices below the lowest average price of the merchandise produced in a free-market country (provided that those free-market products are sold in sufficient volume), are dutiable. This standard protects U.S. producers against the problem of abnormal, non-economic low prices. As to the other concern that nonmarket economy imports would "flood" the markets, I do not believe that this could ever occur unless the nonmarket imports are the lowest priced in the market. Even if such a "flood" should occur, it could be dealt with under the "critical circumstances" provisions of the Antidumping and Countervailing Duties Laws, which would be applicable to an "artificial pricing" case.

At the same time, the standard in S.958 is a relatively liberal one for foreign exporters, as it gives the state-controlled economy producer the benefit of the doubt by assuming that it can sell the product as cheaply as the lowest priced free-market participant in the market. I am not impressed by the argument that this approach forecloses the possibility that the state-controlled-economy producer may, "in the real world," actually have lower costs than the lowest-cost free-market producer. No one can ever know the "true" or "real world" costs of a state-controlled-economy producer.

In conclusion, S.958 provides a standard that is fair to both sides. While S.958 offers the foreign exporter a relatively liberal standard, it also addresses the legitimate concern of the U.S. industry about the possibility of unrealistically low priced imports from nonmarket economy countries. The standard is much more clear and objective, thus enabling the affected U.S. industry to determine whether or not it has a meritorious case for relief and the foreign exporter to know how to price its sales to comply with U.S. trade laws. I therefore strongly urge the Subcommittee to adopt S.958.

STATEMENT OF CARL W. SCHWARZ, METZGER, SHADYAC & SCHWARZ, WASHINGTON, D.C.

Senator **Danforth**. Mr. Schwarz.

Mr. **Schwarz**. Thank you, Mr. Chairman. I am Carl Schwarz, a partner in the Washington, D.C., law firm of Metzger, Shadyac & Schwarz.

I am substituting today for Mr. Peter Ehrenhaft, who was originally scheduled to testify on behalf of certain importers of Polish-made products concerning S. 958, the proposed legislation which is under examination today. Because Mr. Ehrenhaft was hospitalized last week unexpectedly, I accepted the suggestion that I fill in for him today. I apologize for the length of the statement that I have submitted but I hope it can be accepted for the record. I would like to summarize it very quickly, if I may.

Like Mr. Cunningham, I was a participant in the Polish golf car case and I have advised other importers of Polish goods over the years from time to time on their interests and their responsibilities under the antitrust laws and the trade laws of the United States.

One of those firms I still represent is the importer of Polish golf cars. I hope that my experience on that case can be of some assistance to the committee, but I am appearing today on my own behalf and everything I have to say is purely personal.

I would like to summarize my statement in the following manner. I think that S. 958 does address a problem that everybody—and I am willing to be counted in that—concedes is a difficulty under our trade laws that has not yet seen an adequate solution. Goods that are manufactured or sold in an economy overseas that is not governed by market forces be evaluated under our trade laws in the same way as goods from a market economy country. Whatever standard is applied should be objective and not subjective. I think everybody has agreed on that, too.

The traditional test applied by the administering authority until the Polish golf car case came along in 1978 has been to find a surrogate producer in some market economy country around the world and to use that producer's prices or costs as the fair value or foreign market value of the nonmarket economy exporter's product. This traditional test, which is still the test of choice under the Commerce Department regulations today, is, in my opinion, not desirable because it is difficult to apply fairly. I know of no one who has supported the fairness and objectivity of the surrogate producer test. The selection of the surrogate producer is subjective, not objective, and the adjustments that must be made are extremely difficult to make, and, again, are subjective.

In my prepared testimony, I have described the situation that existed in the Polish golf car case where a large mass-produced Polish golf car was being compared to a small Canadian mom and pop job shop product. A considerable number of adjustments were required, many of which were subjective and, in our opinion, were not adequately made.

The price and cost information of the surrogate producer is always difficult to obtain, and especially difficult to obtain for the nonmarket exporter who has just as great an interest in a fair and objective solution to the problem as the U.S. domestic company that is the petitioner.

Finally, and most importantly for the nonmarket exporter, the surrogate producer standard is totally unknowable and uncontrollable by him before he ships, which is a basic need, in my opinion, for any acceptable standard.

The simulated constructed value system, which was applied in the Spanish golf car study that Senator Heinz referred to, was accurately and competently done to the satisfaction of the Treasury Department at that time. I believe that in his remarks Senator Heinz said that certain information was not provided by the Polish exporter. I do note in my statement that there was one item of information that was, indeed, not provided; a general overhead figure for an entire factory complex.

I suggest, Mr. Chairman, that the penalty of withdrawing the injury standard for not supplying a small item of information, for whatever reason, is grossly disproportionate to the so-called crime of not supplying that bit of information. Moreover, it is unnecessary to impose such a sanction because under present law and practice, the Commerce Department has every right and opportunity to make an estimate of that figure if it is not supplied and verifiable.

Thank you.

[The prepared statement follows:]

STATEMENT OF
CARL W. SCHWARZ
BEFORE THE SUBCOMMITTEE ON INTERNATIONAL TRADE
UNITED STATES SENATE COMMITTEE ON FINANCE
HEARING ON S. 958
97TH CONGRESS, 2d SESSION (1982)
JANUARY 29, 1982

Thank you Mr. Chairman.

I am Carl W. Schwarz, a partner in the Washington, D.C. law firm of Metzger, Shadyac & Schwarz. I am substituting today for Mr. Peter D. Ehrenhaft who was originally scheduled to testify on behalf of certain importers of Polish-made products concerning the proposed legislation which is the subject of today's hearing. Because Mr. Ehrenhaft was unexpectedly hospitalized last week I accepted the suggestion that I attempt to fill his rather large shoes. I must apologize, however, that because of the short notice I have not had an opportunity to prepare a statement in the depth that the subject deserves and I may not be able to respond to all of the Subcommittee's questions this morning. I therefore would request the opportunity to supplement the record, if necessary, during the next few days.

Like Mr. Ehrenhaft, I have had the privilege from time-to-time over the past several years of advising various importers of Polish-made merchandise as to the application of U.S. trade and antitrust laws to such imports. One of the firms that I represent is the importer of the famous Polish-made electric golf car. I hope that my experience on that case will be of assistance to the Committee, but I am appearing today on my own behalf and not on behalf of my client or on behalf of any interest other than my own. The views I express today are purely personal.

At the outset, I would like to congratulate Senator Heinz and his staff for the considerable thought which has gone into S. 958. I fully agree that special problems in the fair administration of our country's trade laws are presented by imports of products that are not manufactured or sold in their country of origin under free market conditions. In such cases it is generally not meaningful to compare home or third market prices of a product with the export price of that same product to the U.S. To a great extent the same can be said about the actual cost of manufacture in the home market because the "cost" of a product can only be measured as an aggregate of the prices of the materials and labor that go into it. Of course, where the currency of the exporting country is not freely convertible, which is usually the case with respect to non-market economy countries, these comparisons are even less meaningful, assuming that there can be degrees of obscurity.

Nevertheless, some such form of comparison is essential if we are to deal with the problem in an objective manner because without a standard against which to measure the U.S. import price, we would be forced to dictate "fair" prices for such imports on purely political grounds and on a case-by-case basis. Foreign nations, even those that do not have market economies, are members of the world trading community and have every right to expect non-discriminatory treatment with respect to their exports to this country. Those countries, no less than our own, have a legitimate interest in exporting their goods in order to earn the foreign exchange with which to purchase necessary imports. On the other hand, U.S. domestic industries (and other importing firms) that are competitive and efficiently run have every right to expect that their competitors from non-market economy countries will not engage in the type of price discrimination or below-cost pricing in this market that has traditionally been condemned by our laws as unfair.

Perhaps because of our aversion to price-fixing and because of our nation's general preference for objective, rather than subjective, government, we have been unwilling to solve the problem by case-by-case negotiation of a "fair" price for non-market economy imports. I am told that this is the solution that is used by some other Western nations. We, on the other hand, have continued to search for a price standard for such imports that is fair to both sides and approximates what the cost/price of the product would have been had it been manufactured and sold in a free market.

One such standard, used exclusively by the Treasury Department until the Polish golf cart case came along and still the standard of choice under the Commerce Department regulations, requires the selection of a "surrogate" free-market producer from somewhere around the world and then using his prices and/or costs as the "fair" market value for the non-market import. The "lowest free-market price of a like product in the United States," the standard proposed by S. 958, is really no different from the surrogate producer standard in this concept. Depending upon how closely the "surrogate" producer resembles the non-market producer, and how closely the surrogate producer's country resembles the non-market country, this standard can, quite obviously, be grossly unfair to either the non-market exporter or to the U.S. industry. The golf car case is an example of the former because as the surrogate for the Polish manufacturer - a highly efficient operation where about 10,000 golf cars were being turned out annually as a sideline of an aircraft factory - Treasury selected a small mom-and-pop job shop in Canada that turned out only a few hundred cars per year. To its credit, Treasury was willing to make some adjustments; but not enough, in our view, to make the two operations and products comparable and Treasury refused to accept a "constructed value" study, prepared by an independent Canadian consulting engineer at the request of the Poles, as to how much it would cost to build the Polish product in Canada using the same production methods, materials and labor actually used in Poland.

The surrogate producer standard, even if adjustments are made (which is very difficult -- and subjective -- in most cases), always suffers from two sources of fundamental unfairness to the non-market exporter. First, the price and cost information of that surrogate, if it can be obtained from the surrogate at all by the administering authority or by representatives of the exporter being investigated, is highly unreliable because, by definition, it is being supplied by someone with a clear adverse interest, *i.e.*, a competitor, and is not subject to any guarantees of completeness or trustworthiness. At best, the surrogate has *no* incentive to be forthcoming. For example, the Canadian golf car manufacturer I referred to a moment ago wouldn't speak with representatives of the Polish importer, but cooperated fully with the U.S. domestic industry people in preparing data to submit to Treasury. Accepting critical information from an obviously biased third party without any right of confrontation, compulsory process or cross-examination available to either the "judge" *or* the "defendant" violates every basic concept I have been taught about due process.

Second, the price or cost of the "surrogate producer" is, by definition, not known to the non-market exporter until long after his goods are sold and results in a kind of retroactive or ex-post facto punishment. The entire concept of our trade laws is to give the foreign exporter a self-determinable benchmark against which to set his prices *before* he ships so that he can adjust his domestic price, his export price, or both, to come within the legally permissible "fair" range. Moreover, this benchmark, usually the exporter's own prices in the home market or to third countries, or his own cost of production, should be within his own control and related to his own prices and costs, not someone else's prices or costs which he cannot be expected to know! In passing the Trade Reform Act of 1974 Congress expressly amended the antidumping law to avoid imposing this type of blind or ex-post facto liability upon an exporter. This Committee's Report stated:

> *Sales by Producing Company*.--Subsection (e) of section 321 of the Committee bill adopts, unchanged, subsection 321 (f) of the House bill. It would amend section 212(3) of the Antidumping Act to provide that companies will be deemed to have sold merchandise to the United States at less than its foreign market value only if their sales to the United States are at prices lower than *their own* prices in the home market or, as appropriate, to third countries. *If no sales, or an insignificant number of sales, are made by the company in both the home market and to third countries, comparison would be made with the constructed value of the merchandise produced by the company in question*. Under present law, the Treasury Department is required to resort, for comparison purposes, to sales made by a different company in the home market if the company in question makes no sales, or an insignificant number of sales, of such or similar merchandise in the home market. *This produces occasional inequities by subjecting companies to dumping findings when their prices to the U.S. are not lower than their prices in all other markets in which they sell and, further, by rendering them liable to the imposition of dumping duties on the basis of prices which they cannot control and may not even know about*. The reverse can also be true and companies may escape liability fo dumping duties when -- although their prices to third countries, if used as a basis for comparison, would show dumping margins -- the Treasury is compelled to use as a comparison basis the home market prices of a different producer which reveals no dumping margins. *The amendment will remedy this situation and allow the practices of each producer to stand on their [sic] own*.

Report of the Committee on Finance on the Trade Reform Act of 1974, at page 177. (Emphasis added). To the extent possible, and for the same reasons of basic fairness, this kind of liability should be avoided with respect to non-market as well as market economy exporters.

In 1978 the Treasury Department expressly recognized that its prior practice had been "inequitable" and adopted a new regulation permitting, for the first time, the establishment of a foreign market value for a non-market exporter by constructing a value for that exporter's product. The "inequitable" surrogate producer standard was still, however, retained as the primary standard, for some reason unknown to me. Despite the fact that the statute had always provided for a constructed value standard, the Treasury Department had never permitted such a procedure in non-market economy cases before and even the new regulation made it possible only as a last resort.

As noted earlier, the Polish golf car exporter had, in 1975, unsuccessfully attempted to persuade Treasury to accept a constructed value study for an equivalent product made in Canada. In 1978, in response to a suggestion made by Treasury while it was considering the new regulation, the Poles commissioned an independent Spanish consulting firm to prepare a new and even more sophisticated constructed value study based upon the actual "physical inputs" of the Polish product (labor hours, material quantities, etc.) and valued at the cost of those items in Spain. I don't recall whether it was Treasury or the Polish side which first suggested that Spain be used but both sides quickly agreed that Spain was a fair surrogate market economy country for Poland, not only because of national economic profiles but because Spain, like Poland, had a well-developed automotive and heavy industrial sector.

Immediately after the new regulation became effective, two Customs Officers and I travelled to Mielec, Poland to verify the data used in the Spanish constructed value study. The Poles opened their books to Customs, showed them everything they wanted to see and answered every question, save one; they were unable to provide data for the overhead and administration of the entire, huge aircraft factory complex at which the golf car was manufactured. They did, however, provide Customs with complete data relating to the overhead of the department and the building in which the golf carts were themselves manufactured. Customs estimated a figure for that overall umbrella overhead that was very liberal, deliberately giving themselves a very wide margin for possible error. With this one exception, all of the data in the constructed value study were verifiable and verified. Perhaps because aircraft factories everywhere are especially skilled and practiced at accounting for even the smallest item of cost, or perhaps because in a state-controlled economy there has to be a paper trail for every nut, bolt and hour of labor, both of the Customs Officers told me that the information and cooperation they received from the Poles was superb.

We then travelled to Madrid, Spain where the materials, labor and overhead that actually went into a Polish golf car were valued in Spanish pesetas, a convertible currency, and then into U.S. dollars. Once again, the Customs Officers verified everything to their complete satisfaction. Based upon these verified data, Customs found that the Polish golf cart was not being sold in the U.S. below fair value, i.e., "dumped," and I submit that it never had been "dumped." In 1980 the International Trade Commission revoked the original dumping finding.

Since the golf cart verification, there have been two or three other antidumping investigations involving products from non-market economies. Although I was not involved in those cases and am not very familiar with their facts, I understand that, in the only other "simulated constructed value" case (involving montan wax from East Germany) all of the necessary information was also obtained by the Commerce Department.

Based upon my own experience, the 'simulated constructed value" method of establishing the objective price standard we have been looking for is fair and no more difficult to administer or verify than what is required in many market-economy dumping investigations. Most importantly, the simulated constructed value standard provides the exporter with (1) some of the benefits of whatever comparative advantage he may enjoy in efficiency, technology or materials, (2) a benchmark for pricing that is knowable (or calculateable) by the exporter in advance, and (3) a standard that is not within the control of his competitors, unlike the "surrogate producer" price or cost test. I suggest it is fair to both sides and I strongly urge the committee, if it considers recommending legislation in this area, to provide the option to every non-market exporter to use such a "simulated constructed value" standard in every dumping or countervailing duty case, and not only as a last resort.

Some valid criticisms of this method have been made. It is not perfect, but then again nothing is. The principal criticism is that selecting the "right" country in which to value the non-market labor and material components is not an exact science. I fully agree, but it is no more arbitrary, I submit, than picking a "surrogate producer" and then making dozens of adjustments or simply denying the non-market exporter the right to compete in our market on the basis of price at all, which is what I submit is the actual effect of all standards that use a U.S. market price as the minimum price for imports from non-market economies.

Based upon my experience, the selection of the free market country for valuation purposes is not that difficult, and really not that important, as long as it is kept in mind that the object is not to come as close as possible to a free-market cost of production in the non-market country, something which has been presumed to be impossible to determine anyway. The object is to determine an approximation of a free market cost for the exporter's own product so that he can price his goods above that cost, plus a reasonable profit as required by the statute, and at the same time give the U.S. industry a general assurance that the non-market product is being priced above a figure that reasonably represents the cost of that same product if it were being made in a market economy country. The Poles were willing to make that analysis in either Canada or Spain, and probably would have been willing to accept a lot of other countries too, so the argument that the selection of a country is difficult and arbitrary is really beside the point.

In any event, things tend to even out in whatever surrogate country is chosen. Where Spain probably had lower wage rates than Canada, Canada probably had lower land and capital costs. Where the Spanish peseta showed amazing strength against the dollar in 1978-79, which worked to the disadvantage of the Poles, the Canadian dollar was weak, and the Poles may have been better off if they had insisted on Canada. Again, the object was not to calculate the cost of the Polish product in Poland (a figure which this entire exercise presumes to be useless), but to calculate the cost of the Polish product in Spain or Canada. This is a far different and much fairer objective than telling the Poles that they have to base their prices on the price (or the cost) of someone else's product.

I would like to make a few specific comments about S. 958, which is the subject of today's hearing. As I understand it, the bill would not change existing law or practice with respect to antidumping or, in theory, countervailing duty investigations, involving non-market imports except where the non-market country does not provide and permit verification of any and all information requested by the administering authority. As I have related, I think the Polish golf car exporter would have met this test, but I am troubled by the thought that since there was one bit of information which the Poles could not provide, either because they legitimately felt it to be irrelevant or for some other reason, the case would have been converted under this proposed legislation into an "artificial pricing" investigation, thus depriving the Poles of an injury test. This would have been a "punishment" grossly disproportionate to the "crime." As I understand the bill, solely as an "incentive" to the non-market exporter to provide whatever information is requested by the administering authority, the bill would withdraw the benefit of an injury test from non-market imports where every question, no matter how attenuated, is not completely answered, an injury test that the antidumping law now gives to all imports before dumping duties may be assessed. This denial of the injury test to non-market products, which the bill would also require if the exporting country had not signed the Anti-Dumping Code, is obviously discriminatory and, in my view, unfair, unnecessary and unwise.

In the first place, it is unfair to American consumers who would be deprived of an imported product they wish to buy even though that import causes no material injury to any U.S. domestic industry. There is a corollary to the rule that goes "if it ain't broke, don't fix it," to the effect that "if it ain't hurting anyone, don't forbid it." If no domestic industry is being materially injured, I should think we would not care how much of the product in question is being imported, and if the non-market exporter wants to give it away, so much the better. Withdrawal of an injury standard as an "incentive" to provide Customs with all of the information needed to conduct an investigation is also unnecessary. Exporters already have plenty of incentive to provide full information because Customs can use the "best evidence" rule to supply whatever information is missing. As seen in my experience with the factory overhead data, information estimated by Customs on the "best evidence" available is invariably unfavorable to the exporter. And finally, withdrawing the injury standard and limiting the ability of non-market imports to compete on the basis of price is unwise because it would, in my opinion, virtually shut off trade with, not just imports from, those countries. Imports and exports must necessarily co-exist and American exporters will be the losers, along with American consumers.

As even more "incentive" to provide full information to Customs the bill would arbitrarily fix the "lowest free-market price of like articles" in the United States as the price below which the import cannot be sold in "artificial" pricing cases. I respectfully suggest that this price standard, as defined in the bill, is highly subjective and far more difficult to calculate than a "simulated constructed value," or even a single "surrogate producer" price because it is defined as an average of those prices in the U.S. To calculate a real price (not just take the "list" price) in comparable transactions for all producers is a tremendous job, requiring the ferreting out of discounts, rebates, warranties, spare parts deals, trade-ins, etc. Once more, I think it is important to note that the firms which would have to furnish these data would have no incentive to do so fully or fairly.

The "lowest free-market" U.S. price test suffers from the same basic unfairness as the "surrogate producer" standard described above. It would be impossible for an exporter or importer to calculate this price in advance and still price his goods competitively, with any assurance that he would not be required to pay ruinous duties at some future date. Moreover, the "lowest free market price" would be subject to change without notice, and in any industry where the domestic industry is monopolistic or even just concentrated, those changes could be made at will by the importer's principal competitors. I don't think anyone could imagine a situation more basically at odds with the concepts of the Sherman Act. In effect, the law would be requiring an importer to charge the same monopolistic prices as the dominant domestic industry leaders. Incredibly, this was, at one time, the "solution" chosen by the Treasury Department in the golf car case because it proposed to fix the Polish "foreign market value" at whatever prices were being charged by Textron, the dominant U.S. manufacturer of electric golf cars, for its product here in the U.S.

I would like just to mention quickly a few other problems I have with the bill. First, as a matter of terminology, I would hope that the term "artificial" pricing could be changed to something less pejorative. When a non-market exporter establishes a price for his goods in the U.S. it is no more "artificial" than the prices set by American competitors. See, "Pricing of Products Is Still an Art, Often Having Little Link to Costs," Wall Street Journal, November 25, 1981, p.29.

Second, as I read the bill, it would deprive a non-market exporter of an injury test (and apply the "artificial" pricing standard) in every case where the exporting country had not signed the Antidumping Code. I believe I am correct that although the United States is a signatory, the Senate agreed to adhere to the Code only with qualifications and, in that sense, there would appear to be somewhat of a double standard here. I suggest that there is no reason to deny any importer the right to an injury test in an antidumping case. As far as countervailing duty investigations go, I am not aware that such a case has ever been instituted against an import from a non-market country but the bill would deny an injury test to such imports in an "artificial pricing" situation even if the exporting country is a signatory to the MTN Subsidies Code. I doubt that such a result is intended.

Third, I would suggest that provision be made in the bill for judicial review by the Court of International Trade.

Fourth, I see no need to limit the application of an "artificial pricing" investigation, if it is deemed appropriate to institute such a procedure, to non-market economy countries. Some supposedly market economy countries have industrial sectors where prices and costs are arbitrarily established by the government for social or political purposes and I would suggest that the bill be made applicable to any product not produced under free-market economic conditions or sold under such conditions in the home market. Logically, it should also be made applicable whenever the home market currency is not freely convertible with the U.S. dollar in the sense that the exchange rate is floating, not fixed by the government, and there are no exchange controls or limits on the free transfer of that country's currency. Where such distortions exist, even in a market economy country, I submit that one cannot simply convert the home-market currency into dollars and have a result that is very close to the objective standard we are seeking. This would also conform to the objective of treating all foreign countries alike under our law without regard to the political or social system they have in effect.

I would like to close with an observation as to Section 406 of the Trade Act which S. 958 is intended to replace and a suggestion as to future investigation. Section 406 was intended, as I read the legislative history, to protect against a sudden and massive shift by a Communist country to emphasize the export of a particular product to this country. Monolithic Communist countries were presumed to be able to make such decisions as a matter of national policy and to mobilize such shifts without warning. The legislative history of Section 406 would suggest that Congress was concerned with strategic, not consumer products and logic would support this conclusion since one can hardly imagine a Politburo deciding to flood the U.S. market with clothespins or work gloves. Except for its obvious politically-based and discriminatory application, I have no problem with § 406 and would vastly prefer it to S. 958 simply because it contains an injury standard and because it does provide protection for sudden and massive shifts in export mix by non-market countries, whether those shifts are devious or fortuitous.

My suggestion for future investigation involves the subject of currency conversion analysis. Senator Heinz, in his introductory remarks, indicated that one of the items of information which he hoped S. 958 would encourage non-market countries to disclose in these investigations was the "true [currency] exchange rate applied to that particular industry's exports." I am not sure why the administering authority would find that information useful since it is, just like the exchange rate for tourists, fixed by the government without regard to market forces. (In Poland's case, while previously several exchange rates existed, there is now a single exchange rate for all purposes, fixed at 80 zlotys per U.S. dollar.) A more meaningful "exchange rate" in such circumstances is the subject of an ongoing computerized study being conducted by the World Bank and by the University of Pennsylvania under the direction of Professor Irving B. Kravis. This study, as I understand it, tries to reduce many world currencies, including those of some non-market economies, to a common denominator using a "market basket" analysis for comparison of purchasing power. This study, the third "Phase" of which is scheduled to be published shortly, may provide the framework for a simple and fair solution to the problem which we all agree exists and which is thoughtfully, but I respectfully suggest unsuccessfully, addressed by S. 958.

Thank you,

STATEMENT OF CHARLES OWEN VERRILL, JR., PATTON, BOGGS & BLOW

Senator DANFORTH. Mr. Verrill.

Mr. VERRILL. Good morning, Mr. Chairman and members of the committee. My name is Charles Verrill. I am a member of the law firm of Patton, Boggs & Blow. Actually, I am not. I am chairman of Charles Owen Verrill, Jr., PC, which in turn is a member of the law firm of Patton, Boggs & Blow. [Laughter.]

I have been invited before this committee to comment on the trade remedies regarding imports from nonmarket economies and on proposed S. 958, which I substantially support. I am appearing here this morning entirely on my own behalf. My views and comments, while shaped in the representation of clients in trade cases involving nonmarket economies, are my own, and do not necessarily reflect the views of other members of my law firm or clients that I represent now or in the past.

At the same time, the committee should be aware that I was the original counsel to the domestic producers in the Polish golf cart case. I was the one who recommended that Outboard Marine Corp. file the antidumping complaint in 1974. I was the one who saw the case through the ITC where a finding of injury was made in 1975. Subsequently, OMC went out of the golf car business and I turned to other pursuits.

Currently, I am counsel to the domestic petitioner in the Hungarian trailer axle antidumping case, which Mr. Olmer mentioned this morning and which has recently been suspended after agreement by the Hungarians to raise their prices to at least the foreign market value.

I have a prepared text which has been submitted to the staff. I ask that it be included in the record. I would like at this time to summarize the points that I make in the statement.

First of all, I heartily approve the decision to repeal section 406, which was added in the 1974 Trade Act in the hopes that it would provide an adequate remedy for market disruption caused by imports from Communist countries. It has simply not worked. Mr. Cunningham's testimony dramatically illustrates why.

S. 958 would also repeal section 773(c) of the Antidumping Act. This is the provision that provides for a surrogate or simulated value in cases involving nonmarket economies. Having been involved in those cases, I appreciate how difficult it is to select surrogates and so forth. However, I am not entirely of the view that the law is unworkable. I believe in many cases it has worked albeit very fitfully. Nevertheless, I think the artificial pricing remedy of S. 958 is a very substantial improvement.

One of the reasons why I think section 773(c), the surrogate procedure, is inappropriate is, as others have emphasized, the fact that it is unpredictable. From the standpoint of the foreign producer, the surrogate procedure provides no basis in advance on how to price products exported to the U.S. market. Presumably, that producer is required to go into the marketplace in a market economy to find a surrogate price and use that price on sales to the United States. How can that producer know, however, that that particular surrogate will be the one used by the Commerce Department if somebody brings an antidumping case? He can't. Similar uncertainties confront the domestic company that is faced with substantial imports from a nonmarket economy. This company does not know in advance of initiating a case what surrogate will be used or what methodology for computing fair value will be used. Therefore, the outcome of the case cannot be predicted with any reasonable degree of certainty.

S. 958, as I read it, would be a substantial improvement over the existing procedures precisely because it would result in more predictability and consistency in these trade cases. Therefore, I support its adoption.

There are, however, several difficulties with the procedure that is proposed in the bill. The first difficulty that I think would be most apparent in practice relates to the fact that under the bill, there would be a two-tier determination of whether the economy is a market economy or a nonmarket economy. There would be one determination at the outset of the proceeding; there would be another during the proceeding in the event that sufficient evidence was provided to justify proceeding under the normal antidumping procedures.

In my experience, litigating the issue of whether an economy is market or nonmarket is one of the most expensive and time consuming parts of any antidumping case. In the Hungarian trailer axle case, it took, as I recall, 4 months just to resolve that issue. Not because the Commerce Department was derelict but because the parties, being combative, were anxious to use every opportunity to brief and litigate the issues. I am concerned that the two-tier procedure of S. 958 would unnecessarily result in too time-consuming determinations of this issue in every case and propose, in my statement, an alternative.

[The prepared statement follows:]

STATEMENT OF CHARLES OWEN VERRILL, JR., BEFORE THE SENATE FINANCE COMMITTEE; HEARINGS ON S.958 (MR. HEINZ) A BILL TO AMEND THE TRADE ACT OF 1974,TO PROVIDE A SPECIAL REMEDY FOR THE ARTIFICIAL PRICING OF ARTICLES PRODUCED BY NONMARKET ECONOMIES

January 29, 1982

I am Charles Owen Verrill, Jr., a partner of Patton, Boggs & Blow, 2550 M Street, N.W., Washington, D.C. I am honored to have been invited before this Committee to provide my views on the trade remedies regarding imports from nonmarket economies and to comment on proposed S.958, introduced by Senator Heinz, which would repeal existing § 406 of the Trade Act of 1974 and replace it with a special artificial pricing remedy. This artificial pricing remedy would also replace the surrogate or simulated value method of determining fair value provided for in § 773(c) of the Antidumping Act.

I am appearing here this morning entirely on my own behalf. My views and comments, while shaped in the representation of clients in trade cases involving nonmarket economies, are my own and do not necessarily represent the views of other members of my law firm or clients that I represent now or have represented in the past. At the same time, the Committee should be aware that I am currently engaged as counsel for the Petitioner in the just recently suspended antidumping investigation involving truck trailer-axle-and brake assemblies from Hungary.

A. Introduction

Through either fate or devilish intervention, my first substantial involvement in trade law began almost exactly 7 years ago when Outboard Marine Corporation ("OMC") asked me what remedies would be available to address the increased losses from the company's golf car operations and the coincident increase of imports of golf cars from Poland at very low prices. After considerable deliberation, we recommended that OMC file a complaint with the Treasury Department under the Antidumping Act of 1921. OMC agreed and the complaint was filed in April 1974. Over a year later, Treasury concluded that the Polish golf cars were being sold in the United States at unfair prices (i.e., less than fair value) when compared to the prices of a Canadian golf car producer (the "surrogate"). Three months later the International Trade Commission ("ITC") determined (by a 5 to 1 vote) that the imports from Poland were injuring the domestic golf car industry. Consequently, substantial antidumping duties were assessed until 1978

I cite this example, not because I want to take credit for all of the notoriety that has since swirled around the Polish golf car case, but rather to make a point that I think it is very important. That is, while I know you will hear an antiphon of complaints about the controlled economy provisions of the law as it is currently written and administered (some of which I will agree with), what must not be forgotten is that beause nonmarket economy imports can be uniquely disruptive, there must be an effective remedy. As Senator Heinz remarked in introducing S.958, "the potential for serious market disruption from nonmarket economies is rapidly growing as our economic relations with such nations become more sophisticated." Moreover, the lack of market influence over costs and prices in the nonmarket economies can, and often do, result in prices on exports to the United States that are artificially low.

While § 406 of the 1974 Trade Act and § 773(c) of the Antidumping Act address these issues, I am persuaded that, subject to certain reservations that I will detail later, adoption of the principal provisions of S.958 would improve the administration of trade remedies in cases involving imports from nonmarket economies. The artificial pricing remedy would, first of all, eliminate much of the uncertainty that is inevitable in a nonmarket economy antidumping proceeding under the current Antidumping Act, which disadvantages both domestic petitioners and nonmarket economy producers. More importantly, the artificial pricing standard of S.958 would in all likelihood be a more effective method of calculating the "fair" value of imports produced in economies where market forces do not operate than occurs under the current surrogate procedure.

B. The Rationale of the Current Nonmarket Economy Provisions of the Antidumping Act

The Antidumping Act has been the principal basis for remedial action aginst imports from the nonmarket economies.

(Section 406, adopted in 1974 as an alternative, has not proved practical.) Application of the Antidumping Act in these cases has, however, proved problematic (although by no means impossible) because of the law's conceptual basis and the theorectical and practical differences between "free" and "controlled" economies.

Since its adoption in 1921, the Antidumping Act has provided for special duties whenever a domestic industry is injured by reason of imported merchandise that is sold in the United States at less than the sales price of the same merchandise in the producer's home market or on sales to third countries. In dumping law parlance, the price charged by the producer in its home market is the "fair value" of the merchandise and the antidumping bench mark. And, since 1974, the fully distributed cost of production of the imported product over an extended period in the country of origin can be utilized as the fair value where such costs exceed home market prices.

These provisions rely on the assumption that home market prices are the best evidence of the "fair price" of a product and that the cost of production is a check on that assumption. In this context, it seems obvious that the theoretical validity of the Antidumping Act depends on the existence of "real" markets in the producing country to establish either home market prices or costs. Real in this sense means market style economies where manufacturing or production costs reflect price competition between suppliers and where merchandise prices are set in the marketplace. In other words, there must be market forces at work in the economy where the goods are produced or there can be no assurance that home market prices or costs are a reliable measure of "fair value."

The prevailing wisdom for many years has been that those market forces do not operate in nonmarket economies to produce prices or costs of production that can be relied on as a bench mark for fair value under the Antidumping Act. This phenomena was described as follows in the recent GAO Report on the laws applicable to imports from nonmarket economies:

> "Normal methods of judging the unfairness of a product's price--by comparing its home or export market prices or costs to its U.S. price--generally do not work when the producer is located in a nonmarket economy. Production levels, prices, and costs in these economies do not reflect supply and demand and the domestic currencies have no market exchange rate."*/

And, I would add, even where the foreign currency approaches convertibility, there is a tendency to undervalue the domestic currencies by the central authorities in the nonmarket economies.

In recognition of the unreliability of home market prices and costs in nonmarket economies, Treasury long ago adopted the substitute value or surrogate method for use in antidumping cases involving products from those countries.**/

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*/ Report by the Comptroller General, U.S. Laws and Regulations Applicable to Imports from Nonmarket Economies could be Improved, ID-81-35, September 3, 1981, at 12.

**/ This Treasury practice was codified in § 205(c) of the 1974 Trade Act and continued without change in § 773(c) of the 1979 Trade Agreements Act.

Originally, Treasury applied this concept by using the home market prices (or costs) of a comparable producer of the product in a market economy as the fair value of the nonmarket economy product alleged to be dumped. Then, in 1978, Treasury amended the regulations to provide for selection of the surrogate from producers in a market economy at a comparable stage of economic development to the nonmarket economy. In the absence of a producer of the imported product in a comparable economy, the 1978 regulations provided that the physical components of the nonmarket economy product (raw material, hours worked, etc.) would be valued in a market economy of comparable stage of economic development.

Both methods of fair valuation were used in the Polish golf car case. The original fair value was based, as noted above, on the selling price of a comparable Canadian golf car. After the Canadian producer went out of the golf car business, Treasury in 1978 calculated the fair value (for contemporaneous importations) by pricing the physical components of the Polish golf car (i.e., pounds of steel, hours of labor, etc.) in Spain, adding markups for overhead, profit, packing and the like. This latter "factor of production" method, first authorized in the 1978 regulations, has been little used*/ and, in fact, the regulations and precedents state a clear preference for the use of surrogate prices as the measury of fair value.

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*/ As Senator Heinz aptly emphasized in introducing S.958, this concept is conceptually flawed and I agree. For example, there is no reason to expect costs to be comparable in countries with the same gross national product per capita.

C. Summary of Comments on S.958

As I read the Heinz Bill, the surrogate or simulated value approach of §773(c) would be repealed and present § 406 would be totally amended to provide a new artificial pricing remedy that would be available in all nonmarket economy cases. Assuming the country of production is not found to be a market economy, there would be no need to show injury and the measure of "fair value" would be the "lowest average price" charged in the United States for a "like" product by any producer (or aggregation of producers) from a market economy (including the United States). These amendments would, therefore, eliminate the necessity of identifying a surrogate producer in a market economy and the factor of production method of computing fair value.

In my opinion, S.958 is in general a reasonable and workable alternative to the existing law. First, the repeal of the current §406 provisions is a positive step forward. That remedy is too unpredictable and subject to political and diplomatic tides to offer any assurance of relief to domestic industries and is unfair to the nonmarket economies. Second, the artificial pricing concept is, despite some difficulties that I anticipate, a sensible alternative to the surrogate procedure of § 773(c). That provision could well lead to greater predictability and rationality of outcome of import remedy proceedings.

I do, however, urge this Committee to reconsider the two-tier determinations of the market character of the nonmarket economy producing the products under investigation. As I read S.958, there would be an initial determination whether the country named in the petition is a nonmarket economy. If the determination is affirmative, then during the proceedings there would be a subsequent determination whether "sufficient," and "verifiable" information has been provided to convert the proceeding into a regular antidumping or countervailing duty case. This two-step approach will needlessly complicate these cases. Moreover, the standards for determining when information developed in the investigation is "sufficient" or "verifiable" are too vague and do not reference the real issue. Surely, quantity or accuracy of information is not the appropriate test: rather, the test must be whether market forces operate in the economy to produce prices and costs that are reliable bench marks for antidumping analysis.

D. The Artificial Pricing Method of S.958 is a Reasonable Substitute for the Surrogate Procedure of the Current Law

The surrogate or substitute pricing methodology of § 773(c) has been widely criticized as unworkable, unpredictable and unrelated to real world conditions. I think to put these criticisms in perspective two considerations should be borne in mind. First, the procedure has worked in this country albeit fitfully on occasion for over 20 years now. Secondly, the European Community regulations provide for the use of market economy surrogates in determining fair value in antidumping cases involving nonmarket economy countries in almost identical language to that of § 773(c).*/

Of course, the fact that the law has been in place for a number of years both here and abroad is not in and of itself proof of theoretical or practical validity. In the case of § 773(c), the problem which seems to arouse the most comment is the fact that the present law is unpredictable and places the nonmarket economy producer in an unfair position relative to producers in market economies. In a market economy, so the argument goes, the producer knows its home market prices and costs; it seems improbable that such a market economy producer would be unaware that its prices to the United States are less than fair value except in those cases where unexpected currency fluctuations are responsible for the difference. Dumping then can be avoided by the market economy producer in most instances if that is its intention. There is a valid question whether the nonmarket economy producer has this opportunity to avoid dumping.

This is best illustrated by examining the pricing decision to be made by the nonmarket economy producer when selling to the United States. Does the nonmarket economy producer

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*/ See E.C. Council Regulation No. 3017/79 of December 20, 1979. It is my understanding that most such cases are settled before the final determination is reached.

(assuming costs are not a decisional factor) price at the average of United States prices? Is it necessary to underprice domestic goods in order to obtain a market share? What assurance can be given that whatever price selected will not violate the Antidumping Act? Under present practice, the nonmarket economy producer is presumably required to determine the price of a similar product in a market economy and use that price as the selling price to the United States. However, the nonmarket economy producer does not know in advance what market economy producer price will be used as the surrogate if an antidumping petition is filed. Moreover, list or published prices of producers in the potential surrogate countries often do not reflect the transaction prices dictated by the marketplace: actual transaction prices and costs which are often jealously guarded secrets may not be available to the nonmarket economy producer.

I must add that comparable uncertainties confront the domestic producer faced with imports from a nonmarket economy. There is no way to predict with certainty what surrogate the Department will accept; there is no way to predict (with accuracy) currency fluctuations that may impact on the fair value analysis; there is no way to predict the degree to which adjustments may affect margins; and so on.

Given these uncertainties, I have reached the conclusion that a new approach to calculation of the fair value of nonmarket economy imports is warranted. The artificial pricing provisions of S.958 are, in my judgment, a realistic and practical alternative.

Under S.958, the "fair value" of a product from a nonmarket economy would be the lowest average price (with appropriate adjustments) charged for like articles in this country by any producer or aggregation of producers from any free market economy, including the United States. Interestingly, this is also a surrogate or substituted value procedure: one, in fact, which substitutes the most competitive producer(s) as the surrogate. The principal difference from the § 773(c) approach is that the "fair value" (i.e., the lowest free market price) would be based upon the price of a product produced abroad and sold in the United States. This approach is conceptually justifiable because an imported product will not be sold in the United States unless the producer has a comparative advantage relative to domestic producers (or the product is subsidized or dumped, points to be addressed later).

Presumably, information about lowest average prices charged in the United States will be available as a guide to the nonmarket economy producer in setting prices on sales to this market. And, domestic producers will be able to decide whether or not to initiate artificial pricing cases against nonmarket economy imports based on their knowledge of market prices for both domestic and imported products.

In those situations where the product is not imported into the United States from market economies, then the lowest average domestic prices will be the measure of normal or fair value. There may be criticism of this measure of fair value, but I am persuaded that if no market economy producer is willing to sell to the open United States market, then it must be because the domestic producers have the comparative advantage.

In practice, I do see some difficulties with the artificial pricing calculation. How, for example, is the Commerce Department going to know what the lowest average price is? Reference to Customs statistics may not be of much help since most TSUS items are basket categories that include a fairly wide range of products. For example, TSUS Item 607.17 includes all low, medium and high carbon steel wire rods and there are very substantial price differences between each grade. These difficulties, however, prove only that the artificial pricing concept is not a panacea. Surely, determining prices of like products in the United States will be less complicated than determining prices in foreign countries as is required under § 773(c) and enormously less complicated than calculating fair value by the factor of production method. Hence, the artificial pricing method of S.958 is an improvement over the existing practice.

It must be recognized that the artificial pricing concept would give the nonmarket economy producer the benefit, always, of the lowest average price charged by market economy producers. Whether valid or not, this suggests a finding that the nonmarket economy producers are always as efficient as the most efficient market economy producers. It will be argued that this in effect would give the nonmarket economy producers a "license" to dump much as the trigger price system apparently permitted European producers to sell below their home market prices or costs of production. Whatever the merits of this argument, it may not result in any practical difference from exisiting practice since I have a hunch that Treasury and later Commerce generally sought to identify surrogates with the lowest prices in nonmarket antidumping cases any way.

I think a more important consideration is the fact that the artificial pricing procedure may potentially discriminate against less developed countries. For example, suppose Brazil and Czechoslovakia both produce cast iron wheels for passenger cars for export to the United States. Suppose also that Mexico is the lowest cost producer of wheels that are sold in the United States and that the Mexican price, after adjustment, is lower than the Brazilian home market price and/or cost of production. In this example, the Czechoslovakian wheels could be sold at the Mexican price but the Brazilian wheels could not without risking an antidumping investigation. I do not know for sure whether this example is far fetched, but I suspect it is not.

Another potential problem with the artificial pricing provision as I see it is the fact that producers in the appropriate free market country used to determine the lowest free market price may be suspected of dumping or receiving subsidies. But, if there has not been a preliminary or final antidumping or countervailing duty finding with respect to the like article, those prices could still be used. I think there ought to be an opportunity to raise such issues in the context of the determination of what is the appropriate free market country.

For example, if there is a determination that the steel sector in Brazil is subsidized in a case involving steel plate, should Brazil be considered an appropriate free market country in an artificial pricing investigation involving structural steel as to which nobody has yet filed a countervailing duty petition? Clearly, in that example the structural steel is just as likely to be subsidized as the steel plate and it would be unfair to use Brazilian structural steel as the lowest average price determinant. Hence, I would recommend that a provision be added authorizing Commerce to disregard prices of products where there is a reasonable indication that the producer is subsidized or dumping even if no formal proceedings have been initiated.

E. The Two-Tier Nonmarket Economy Determination in S.958 Should be Changed

In at least two recent nonmarket economy dumping cases, countless hours and dollars were spent in consideration of the question whether the economy of the countries involved (Hungary and the Peoples' Republic of China) were, in fact, "state-controlled" to the extent that sales or offers of sales in those countries did not permit determination of fair value under the normal rules. In both cases, the petitioner and the exporter retained academic and economic experts who prepared extensive analyses of the Hungarian and Chinese economies and the extent that market forces influence (do not influence) internal prices and costs. Voluminous briefs were filed by both sides and the initiation of fair value analysis was delayed many months. While the decision in each case is a precedent, the Department has made it clear that a different result could be reached in subsequent cases involving the same countries. Hence, the very expensive and time consuming process of determining whether an economy is state-controlled is likely to be replicated in future cases.

As I understand S.958, this practical difficulty with the current law would not be alleviated: in fact, it might be compounded. This is because on filing of an artificial pricing petition, there would have to be an initial determination whether the country named was a nonmarket economy within the new definition. If the decision was affirmative and the petition accepted, the issue could come up again during the Department's consideration of the question whether the information provided by the nonmarket economy is "sufficient" to permit the investigation to be conducted as an ordinary antidumping (or countervailing duty) case: that is, to use the home market price or cost of production as the determinant of fair value. Given the combative nature of these proceedings, I envision both determinations as generating costly controversy and delay.

Moreover, as I read section (C)(1)(A) of S.958, it would provide that nonmarket economy producer would be entitled to a the determination under the usual antidumping rules--that is to be treated like a market economy producer--whenever it

> "furnishes verifiable information to the administering authority in connection with such investigation which is sufficient, in the judgment of the administering authority, to permit the investigation to be conducted as a countervailing duty investigation or an antidumping investigation...whichever is appropriate."

If this is intended to mean that by the provision of verifiable information the nonmarket country could gain the benefit of the usual rules applicable to market economies, than I think it should be changed. The inquiry should not focus on the availability or sufficiency of information but rather on whether there are market forces in the economy that influence prices and costs. Thus, a nonmarket economy may provide voluminous, verifiable information, but if, for example, input costs are artificial, the economy should still be considered nonmarket. Section (C)(1)(A) of S. 958 is too vague on this point.

Despite the foregoing comments, I applaud the decision to eliminate the §406 test of applicability (i.e., "dominated or controlled by communism") and to modify the rather stilted language in §773(c) of the Antidumping Act into a more substantive definition of nonmarket economy. However, I suggest that S.958 be modified in two respects: while the case by case determinations of what is a nonmarket economy should be retained, the two-tier approach should be abandoned. Second, specific statutory criteria to be applied by the Department should be incorporated in S.958.

In my opinion, the issue of whether a country is a market economy or not should be decided at the outset of an investigation and under expedited procedures. This determination inevitably increases the costs to both petitioners and the foreign producer and/or country and the two-tier determination under S.958 may well prove to be even more cumbersome and costly. I suggest that, as an alternative to the two-tier determination, a provision be added to S. 958 that would require the International Trade Administration to determine, pursuant to statutory criteria such as those described below, whether the economy is nonmarket within forty-five days of the filing of a petition. This mandatory time limit would not be a burden to the parties since there would be no simultaneous injury proceeding at the ITC, and would be a substantial improvement over the present procedure.

F. Congress Should Establish Statutory Criteria for Nonmarket Economy Determinations

I believe Congress should establish explicit criteria for determining which countries are nonmarket economies. For purposes of discussion and consideration by this Committee, I suggest the following:

First, does the country involved recognize the right to strike and bargain for wages. I do not mean to be provocative on this point because of the tragic events in Poland, but I do believe that wage control is a very important factor in determining whether market forces influence costs and prices. Even in Hungary, where much has been made of the fact that in 1980 the wage regulation system was changed to allow more enterprise flexibility in wage differentiation, the central authorities continue to keep a very tight control on the overall wage package both at the industry and national level.*/ This sort of "tight control" has inevitably resulted in wages being an ultimately insignificant factor in the cost of production of manufactured goods.

It is, in fact, my impression from a review of the Hungarian economic literature, that the central control of wages has resulted in such low labor costs that there is a substantial price/cost distorting subsidy to every manufacturer in Hungary. This has been specifically acknowledged by the Director of the Hungarian Economics Research Institute, Dr. Lajos Osvath, who commented in an article published just a year ago that:

> "I regard as the greatest contradiction of our entire system of regulation the fact that while

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*/ Joseph C. Kramer and John T. Danylyk, "Economic Reforms in Eastern Europe: Hungary at the Forefront," Eastern European Economic Assessment, a Compendium of Papers Submitted to the Joint Economic Committee, 97th Cong., 1st Sess., February 27, 1981, 549 at 563.

> we are striving to assert by every means the effect and value judgments for the world market, we are artifically maintaining at a low levelthe costs of using live labor."*/

In the same article Osvath concludes that as a result of the "undervaluation of the use of live labor," there is a "subsidization" of manufacturing and a "situation that labor costs are nearly negligible factor in the cost structure of production."**/

The "subsidization" Osvath references is substantiated by comparing wages as a percentage of the value of gross output in Hungary and some representative countries:

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*/ Article by Lajos Osvath, Director, Economics Research Institute (Hungary), Budapest Kulgazdasag, December 1980, JPRS 77403, February 17, 1981, 9 at 19.

**/ The Osvath article documents the "negligible" role of wages in the cost structure of industrial production in Hungary by the following table

	1968	1975-76	1980
Materials and materials related costs	74%	77.6%	81.1%
Wages, personal incomes, wage-commensurate charges	16%	13.6%	12.6%
Depreciation	4%	4.4%	4.3%
Capital use charge and other costs	6%	4.4%	2.0%

His source: Bela Csikos Nagy, "A Magyar Arpolitika," (Hungarian Price Policy) 1980.

Wages as a Percentage of
the Value of Gross Output */

Country	Wages	Value of Gross Output	Wage Percentage
Hungary	57.	646.20	8.82%
Austria (1975)	81.6	408.5	19.98%
Finland (1977)	15,891	91,072	17.45%
Denmark (1976)	27,469	103.577	26.52%
Fed. Rep. Germany (1977)	194.12	895.7	21.68%
Italy (1975)	13,220	80,180	16.49%
Norway (1976)	21,181	107,971	19.62%
Spain (1976)	806.1	4,439	18.16%
U.S.A. (1976)	212.2	1,188	17.86%

Putting aside any ideological considerations, it is apparent from the foregoing table that wage control in Hungary must have a substantial effect on internal price and cost formation and that this must inevitably have an impact on the prices charged in international trade transactions. Low wage rates resulting from level of development is, of course, an entirely different matter: the emphasis should be on wage cost control such as apparently has happened in Hungary where there is a developed industrial infrastructure.

For the foregoing reasons I think that the extent to which wages are freely bargained for ought to be a consideration in

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*/ Source: 1978 United Nations Statistical Yearbook at 219 et seq. Wages and values are expressed in millions or billions of units of national currencies.

determining whether or not a country is nonmarket for purposes of the various trade remedy statutes. Indeed, as I see it, the wage subsidy clearly defines the distinction between the controlled and market economies. And, it seems to me that until there is some competition for wages, i.e., worker bargaining, that the wage subsidy is likely to continue to distort the prices of nonmarket economy goods when sold in the United States and other Western market economies. Therefore, I recommend that this Committee consider wage formation as an elementary consideration in whether a country is to be regarded as a nonmarket economy country.

The second criteria which I would recommend the Committee consider is the degree to which the currency of the country involved is convertible. I recognize that convertibility is an elusive concept and that there are no specific criteria that can be applied in a litmus fashion to determine the convertibility of a currency. This is recognized in the GAO Report which describes the new International Monetary Fund Articles of Agreement concept of a "freely usable currency" as a currency that is (a) widely used to make payments for international transactions and (b) widely traded in principal exchange markets.

I am not an expert on currencies and what little knowledge I have is probably likely to bring me into dangerous waters when the subject is approached. Nevertheless, the evidence that I have seen suggests quite strongly that currency convertibility should be an important consideration in the evaluation of whether the economy of a country is nonmarket or market.

In Hungary, for example, the Central Bank has adopted a policy of, on the one hand, increasing incentives for exports and at the same time ensuring that the growth in the economy will be maintained at a level necessary to ensure that real incomes will not change throughout the duration of the current five year plan. As explained by Matyas Timar, President of the Hungarian National Bank:

> "The rapid external inflation and the relatively stable [domestic] price level made an active rate of exchange policy necessary as well as the appropriate modification and an upward evaluation of the rate of exchange level for the forint. In recent years, this principal was not fully realized. We did not evaluate the forint upward to the extent that would be required on the one hand by the development of the foreign market price level and on the other hand by our effort to assure a relatively stable domestic price level."*/

Timar also observes that the objective during the first half of the 1980's will be an intensification of exports and a modest rate of inflation built into the domestic economy to balance wage increases. In short, a flat growth policy so as to achieve equilibrium.

The Hungarian example demonstrates not only the important role of exchange rate policy but also the interrelationship of wage regulation and exchange rate policy in achieving the economic goals of the government. It is clear that the cost of enterprises will increase as world prices are reflected in their input costs in Hungary, but at the same time, because of wage policy, the influence of wages will have a decreasing importance as a percentage of overall costs.

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*/ Article by Matyas Timar, President, Hungarian National Bank in Budapest Penzugyi Szemle, July 1980, JPRS 76294, August 26, 1980, 62 at 64.

At this point, I would like to emphasize that an analysis of market forces in any economy cannot be precisely determined by reliance on a "formula" of various factors: the complex nature of macroeconomic interaction requires that the overall economy be assessed in its entirety at some point. For this reason, Congress should refrain from establishing a mechanistic procedure which would require Commerce to attribute a precise quantification for each criteria.

A third criteria which I would recommend be considered is the degree to which the country authorizes joint ventures and investments by United States firms. The GAO Report, in addressing this issue, suggested that there may be "islands of market behavior, where joint ventures could demonstrate enough market influence in their operations to allow their export prices to be used in dumping proceedings." The GAO suggests that such market influence may exist:

> "When they keep accounts in a hard currency, operate for a profit, and have labor, utility and rent costs generally comparable to those in representative market economies."

These criteria strike me as appropriate indicia of market behavior especially if the following considerations are also taken into account.

I would add to the GAO list an evaluation whether the economy permits equity investments by United States firms. In Mexico, for example, where there is abundant natural gas and low wage rates, United States firms are able to invest in equity positions in enterprises and profit, therefore, not only from a joint venture position but also from return on equity. Again, at the risk of sounding ideological, I think the opportunity for such investment should be a consideration in whether or not a country is regarded as market or a non-market economy.

Finally, the concept of a "sectoral" approach in assessing the degree of state control has been subject to varying interpretations in recent cases. I believe that Congress should clarify the extent to which a particular sector within a non-market economy country may be regarded as a "free market" sector. I would caution, however, that such an approach must not totally ignore the nature of that country's economy as a whole, and the pervasive effects (both direct and indirect) which are necessarily felt by every sector within the economy.

CONCLUSION

In conclusion, I urge this Committee to adopt S.958 with the modifications I have recommended.

Senator **Danforth**. Senator Heinz.

Senator **Heinz**. Mr. Chairman, thank you. Gentlemen, it sounded like, with the possible exception of Mr. Schwarz, you all agreed that the present laws we operate under in this are all: First, cumbersome and complex; second, that they are arbitrary and totally unpredictable; and third, that there is practically no assurance or real possibility of any party, domestic or foreign, getting a fair result. Would that be an accurate description of your opinion of current law, Mr. Cunningham?

Mr. **Cunningham**. I would certainly endorse that statement.

Senator **Heinz**. Mr. Schwarz, would you go that far?

Mr. **Schwarz**. No, Senator, I would not go that far. But I do think much of what you have said is true. As I indicated in my prepared testimony, I think that the fairest standard of all and the best from both standpoints is the simulated constructed value system that worked so well in the Polish golf car case, and ended up with a fair result. If one is to judge fairness by who wins and who loses, I am sure Mr. Cunningham and Mr. Verrill who both represented the domestic golf car industry would feel that was not a fair result because they didn't succeed. I think that the objectivity of the standard that was used there, and the ease with which the verification was conducted indicate that the present laws are not too cumbersome or arbitrary. Quite frankly, that investigation was conducted in an atmosphere of total cooperation, total, absolute cooperation, and full information being given, with that one exception that I told you about. I believe that standard—simulated constructed value—should be available in every, every antidumping case involving a nonmarket economy country. Now I am not saying it is a perfect solution, but I do believe that if that were done, a lot of other solutions could also be used as alternates.

Senator **Heinz**. Mr. Verrill, do you agree that by and large our present laws are cumbersome, arbitrary, and potentially unfair to one side or the other?

Mr. **Verrill**. Senator, as I have stated in my testimony, I view the present nonmarket economy provisions of the antidumping law as cumbersome and costly. I would not say that those provisions are incapable of achieving a result which is reasonably close to what would be regarded as fair. I think the proposal of S. 958 would be a substantial improvement over the existing law because it would be more precise and certain and would eliminate some of the ambiquities that currently exist. At the same time, it has been my experience that the Commerce Department has worked very diligently under the current law to achieve a result in these cases that would overcome the otherwise apparent arbitrariness of the law.

Senator **Heinz**. Now Mr. Schwarz maintains that he believes that the present system of constructing a value—a set of prices of inputs—is no more complicated, burdensome or inaccurate than the artificial pricing test in the bill. Do you, Mr. Verrill, and do you, Mr. Cunningham, feel the artificial pricing test is, in fact, an improvement over what has been current practice?

Mr. **Verrill**. I think so. If I may say so, I think it is 1,000 percent improvement over existing practice. The factor of production approach, without going into the details of the Polish golf car valuation, it seems to me, as you noted in your introductory remarks of S. 958, is conceptually flawed. I have read a number of commentaries that point out through economic evaluations that that particular procedure could result in absolute unforeseeability of results because of the requirement of selecting the country where you would value the factors of production, the problem of currency conversions, and all of the other problems that are associated with taking factors of production in one country, evaluating it in another country, and using the result as a fair value in this country. It seems to me that prices, which are charged in the marketplace, are by far the best evidence of what fair value is. This bill does that.

Mr. CUNNINGHAM. Senator Heinz, I agree with Mr. Verrill. I would add a couple of points to his analysis. First, that an antidumping law, as any law which governs the behavior of businessmen in the marketplace and characterizes some behavior as fair and some as unfair, should set a standard which businessmen can understand and can use to guide their pricing decisions. Whatever anyone may say about the present hypothetical, artificial, imaginary golf car plant on the fields of Spain where they don't make cars—an approach that the Commerce Department uses—one cannot say that it establishes an intelligible standard for businessmen to set their prices—for importers, to set their prices of nonmarket economy imports—or a standard by which a U.S. industry can determine whether it should or should not bring a case. If you want irrational pricing in the marketplace, if you want cases that are brought solely in a lottery mode—we will just bring a case and we will see whether we win or lose, but we certainly don't know—then stay with the Commerce Department's present approach. If you want a rational pricing guide that people can see in the marketplace, go to the bill that you have, Senator.

Senator HEINZ. We will put you down as undecided.

Mr. CUNNINGHAM. Yes. [Laughter.]

I would just like to make one other point. Mr. Schwarz has said that the pricing approach, the constructed value approach is workable.

Senator HEINZ. Mr. Olmer said it is not.

Mr. CUNNINGHAM. You have to give me a chance to finish. I just think Mr. Schwarz is in total disagreement with Mr. Olmer on that, and I think there is a reason for that. That is that the golf car case was handled by Treasury in a way totally different from the way Commerce now handles these things. In the golf car case, the Treasury handled it by allowing the Poles to prepare the analysis, set up the whole framework and then let Treasury "verify" what the Poles had done. The Commerce Department has taken the view in subsequent cases that it's not the job of foreign producers. That's our job. We are the one to make the analysis. We are charged by the statute with doing that, and they found they can't do it rationally.

Mr. SCHWARZ. Can I comment on that?

Senator HEINZ. Yes, by all means. Certainly.

Mr. SCHWARZ. With regard to the last point that Mr. Cunningham made that it was Treasury's job to make the analysis, well, that, I believe, is no different than in market economy dumping cases. The foreign exporter always supplies information that is then verified when the Commerce Department or the Customs people go abroad and look at the exporter's books and look at his factories. I don't see why the nonmarket people should have a different system applied to them. I did not handle a case like this before the Commerce Department—only before the Treasury Department—but, I don't know why, if they have changed, they have changed. The method worked so well at Treasury, but if Commerce is looking for difficulty, they may have found it. I would recommend to them perhaps to go back and look at the way Treasury did it. We had no difficulty. No one has ever suggested any of the information supplied by the Poles was incorrect. Treasury did not bear the administrative burden and expense of doing that kind of study. The study was prepared by an independent consulting firm. Actually, we had two of them prepared; one for Canada and one for Spain. The suggestion that Spain was chosen just out of a hat arbitrarily is simply unfounded. It was chosen for good reasons, but we would also have taken Canada. We probably would have taken a dozen other countries. I don't think the difficulty of selecting a surrogate country is that significant, and if it causes a great deal of difficulty to the Commerce Department, I am sure that many exporters would be willing to let them pick three and then take one out of the hat. It's not that significant.

Senator HEINZ. Well, the point that you made might bear some other comments by our witnesses was that what the Treasury Department did several years ago with the Poles was exactly what we do with market economies under antidumping in terms of requesting information. Let me ask Mr. Cunningham, if he would, to make any observations on that statement.

Mr. CUNNINGHAM. Well, I think that is not the case.

Senator HEINZ. You think that is not the case?

Mr. CUNNINGHAM. Not the case. What is done with market economy countries is they are asked to submit specific data. They are given essentially a questionnaire, which is not quite a fill-in-the-blanks questionnaire, but it is a questionnaire that is very detailed. We want this particular item and the item we want is a number. That is, the price at which you sold such and such, the price at which you bought such and such a raw material. That sort of thing.

What the Poles were asked to do was prepare a study and they prepared a study. They created the study. They created the framework for analysis. What Commerce has said now is that we are not going to allow the foreign producer to create the framework for analysis in a nonmarket economy case any more than we will allow them to create the framework for analysis in a market case.

Mr. SCHWARZ. Senator, may I interrupt?

Senator HEINZ. Sure.

Mr. SCHWARZ. I don't want to interrupt your line of questioning, but I would like not to have that go unanswered, if I may.

Senator HEINZ. Please proceed.

Mr. SCHWARZ. It is true the Poles prepared the study, or actually commissioned an independent consulting firm to prepare the study. But it was in response to a question. It wasn't a written questionnaire, but the Treasury Department said, look, give us a list of all of the special things that go into a golf cart. It's exactly what Mr. Cunningham said is done with the others. Then we sent those to that consulting firm in Madrid and another consulting firm in Canada and they evaluated it at the local prices. I don't see any conceptual difference, and if Commerce now actually goes over there and starts making its own study, I can understand how they might want to avoid that. It's a burden they shouldn't have to bear.

Senator HEINZ. Let me ask whether any of you would support the Federal Government maintaining a list of nonmarket countries to simplify the Commerce Department's job. Mr. Cunningham.

Mr. CUNNINGHAM. I don't think that's a bad idea at all. I think the list would be dynamic. Obviously, some countries, just as they graduate from GSP treatment, they can graduate or emerge from the gloom of nonmarket economy status. There is an issue that is, to some extent, still unresolved as to whether a country should——

Senator HEINZ. We, hopefully, will have a hearing on that subject of graduation under GSP 1 day. A lot of people are a long time in getting their high school diplomas.

Mr. CUNNINGHAM. I can understand that. But at any rate, I think the concept is that at some point the country would have the opportunity to cease to be a nonmarket economy. At any rate, there is also one other complication that arises in these cases and that is whether a country must be, for all purposes, a nonmarket country. That works both ways. There may be some that we consider market countries but have sort of nonmarket pockets in them. But I think a list of those countries whose economies are deemed to be so thoroughly controlled by the state that they are presumptively, at any rate, subject to rebuttal if the rebuttal can be made. It would be helpful because it would tell a petitioner what type of case he ought to put together.

Senator HEINZ. Do either of you disagree that much with Mr. Cunningham's comments?

Mr. SCHWARZ. I don't think a list can really hurt, but I quite frankly think it could be misleading because as Mr. Cunningham pointed out, there are a lot of market economy countries that have nonmarket sectors. The product could be manufactured and sold in a nonmarket method. I, personally, don't think the list would be workable and it would be somewhat misleading, but I can't see any great disadvantage to it.

Senator HEINZ. Mr. Verrill.

Mr. VERRILL. I don't see any real advantage to having a list. At one time, I thought it would be a good idea to have one, but as I reflected on it, I decided that it would not be sufficiently dynamic, given the way the Government works, to reflect changing conditions in the economies of these countries. Also the changing perceptions that petitioners would have as they approached bringing a case.

Senator HEINZ. One last issue. Our time is growing short. What I would like for you all to comment on was something raised by Secretary Olmer a few minutes ago was whether or not Commerce Department decisions on whether a country is a nonmarket economy or whether the information provided is sufficient and verifiable should be subject to judicial review. Mr. Cunningham, would you care to express an opinion on that?

Mr. **Cunningham**. My view on that is that it should be subject to judicial review but not to interlocutory review. I am a firm opponent of the multiplicity of interlocutory appeals that burden the system now. But I do think that any key issue that affects the outcome of a case should, at the end of the case, be subject to judicial review.

Senator **Heinz**. Mr. Schwarz.

Mr. **Schwarz**. For once, I agree.

Senator **Heinz**. Mr. Verrill.

Mr. **Verrill**. So do I.

Senator **Heinz**. Mr. Chairman, your witness.

Senator **Danforth**. Let me just ask a few questions. If the costs of a product manufactured in another country are available, then there is no need to have some artificial mechanism for estimating. The problem with nonmarket economies, as I understand it, is that for one reason or another we have difficulty estimating exactly what the costs are. Am I right so far?

Mr. **Cunningham**. I think you are mostly right. What is not perceived by many people is that it is not only difficult, perhaps impossible, to understand what the costs of a nonmarket economy producer is, but it is also difficult to determine whether the factors of production are not skewed by the influence of the state. That is, how many labor hours are used, how much automation is in the plant, how much capital investment was put into the plant and that kind of thing.

Senator **Danforth**. By the state?

Mr. **Cunningham**. Skewed by the state. That's right.

Senator **Heinz**. In other words, how much in the way of subsidies are present.

Mr. **Cunningham**. That's right. That's right. Any nonmarket economy case, even if it is filed as a dumping case, has some state involvement and, therefore, subsidy overlay that permeates everything in the case. That is another fundamental flaw in the current methodology of the Commerce Department because they look to what are the relationships, the factors. How much labor, how much plant and equipment, how much investment, and that sort of thing. Then they take the factors, units, and transpose them to a free market country such as Spain and try to reconstruct the plant and the hours of labor there, and attach Spanish costs to them. The problem is that the relationships are also skewed and so the analysis is faulty even on those terms.

Mr. **Verrill**. I might add to that, Senator Danforth. There has been, I think, for many years the understanding or perception, and I think rightly so, that as stated in the GAO report, production levels, prices, and costs in those economies do not reflect supply and demand. In other words, market forces don't work within those economies. Therefore, there is no assurance that a cost that is achieved or a price that is determined has any relationship to what the cost or price would be if market forces did, in fact, work in that economy.

Senator **Danforth**. So let me see if I understand. The lack of verifiable information is, in your view, not a matter of another country playing its cards close to the vest, and not a matter of the other countries failing or refusing to disclose these costs. It's simply that there are two entirely different economics involved. That it is not possible—the cost or the pricing or the unsubsidized cost of a product. Is that correct?

Mr. **Cunningham**. That is certainly my view, Senator.

Senator **Danforth**. Is that the view of everybody else?

Mr. **Verrill**. Mine, too. I think you can get in these cases loads of information that may even be verifiable. The question, though, is whether the information itself is valid, and I think that's the principal point.

Senator **Danforth**. Well, if that's true let me ask this then. It's my understanding of this bill—the point of the bill is that if verifiable information cannot be obtained then the price that is constructed is the lowest average adjusted free market price. Do I understand that right?

Mr. **Cunningham**. Yes; that certainly is the language.

Senator **Danforth**. Here is what I want to know then. According to you, in nonmarket countries, verifiable price information would never be available.

Mr. **Cunningham**. That is certainly my view.

Senator **Danforth**. That's a peculiar way to word a bill. Why don't we just say in all cases, verifiable information is not available. It's not just a matter of them closing off—it's just not possible to do it.

Mr. **Schwarz**. Mr. Chairman, the information is there, and it is verifiable. Where I would disagree with what the other two gentlemen have said is that it is just not meaningful in free market terms.

Senator **Danforth**. It's not what?

Mr. **Schwarz**. It's not meaningful in free market terms. It is there; it is verifiable, and as we demonstrated, it is easy to get. But what Mr. Cunningham has said about the skewing of the factors of production is true but in my opinion, not a subject with which we should concern ourselves. If the Poles want to make a golf car by putting a little more labor into it and less materials, I don't see why we should object to letting them do so as long as we can calculate, for the benefit of our industry here in the United States, whether or not that final product is being priced in a fair manner.

Senator **Danforth**. What does the bill do? That's what I don't understand. Is the effect of the bill that in nonmarket economies it is never the case that we can get a fair rating of costs and so on? Therefore, in all cases, we are going to look at the lowest free market price?

Mr. **Schwarz**. No, sir.

Senator **Danforth**. Or is the point of the bill that regardless of the difference in economic systems, it is possible, as you say, to calculate what the costs are? Therefore, we will proceed to calculate what the costs are, and too bad that we have different economic systems, but the calculations of the costs is the point. And if we can calculate the costs, that's the rule we use?

Mr. **Schwarz**. Mr. Chairman, I believe the bill is not clear as to its intent on this, and I suggest that it is a mixture. It is possible, as I understand the bill, that the Commerce Department could engage in a freewheeling investigation of the entire economy of the nonmarket economy producer. They could go into exchange rates, and they could go as Mr. Cunningham suggested, into whether or not they are subsidizing baby clothes at the expense of motors or whatever. Under the bill there is a presumption that as long as they are interested in it, they should have a right to get it. But my point is that it wouldn't be meaningful even if they got much of that information. It would end up in practicality as always being an artificial pricing investigation; always taking the injury test away.

Senator **Danforth**. What is your view, Mr. Cunningham? Is it your view that if this bill were passed, the result of it would be that we would always be using this alternative measure?

Mr. **Cunningham**. My view is, that is what the bill should do, and it should be made clear that it does that. Let me explain one point.

Senator **Danforth**. Is it your view that this is what the bill does do?

Mr. **Cunningham**. That is my interpretation of verification. Verification is not merely a matter of checking the numbers. Verification is a matter of making sure the numbers prove what the Department wants to be proved in the case, and that goes into the problems that we have. If that is not clear, let us change the language to make it clear.

The reason that I have a problem with Mr. Schwarz's analysis, when he says that we need not be concerned with whether the Polish Government affects the amount of labor or the amount of investment in there, is that if that were done in a market economy, if the government affected by what we would call subsidizing, putting more investment into that plant and making it more efficient, we would have a countervailing duty case. What he is saying is we have no business in going against a nonmarket economy country government for the same things that we now go against the market economy government for. I think that is wrong.

Senator **Danforth**. Let me ask another question. Let's suppose a hypothetical country called Poland, and let's suppose that this hypothetical country is an economic disaster. That it has severe internal turmoil. That its workers have staged sit-ins. That it has been taken over by a military government. Marshal law has been imposed, and that the effect of that is that the workers are engaged in a constant slowdown in production. Under those circumstances with the slowdown, industrial sabotage and everything else that goes on, for a certain product, the cost of that product instead of being what it used to be has gone through the roof. It is now $1,000. Let's suppose the same product is made throughout the world, and the average price around the world is around $200. But the lowest free market has a price of $100. Let's suppose further that the Government of this country decides that in order to keep people working and reasonably happy, it is going to sell the product at any cost.

Now under this bill, would it be the case that they could sell it anywhere below their cost of production, which was $1,000, but above $100, and that it would never be verifiable? We would always be talking about apples and oranges because they are different types of economies? Or in the alternative, if we don't read the bill that way, but read it in terms of actual verification, that they could just withhold figures, withhold facts? They could end up dumping this product at $100 and selling it all over the world?

I mean are we inadvertently letting nonmarket economy countries off the hook by this?

Mr. **Cunningham**. I think it is true that the bill would allow them to sell at $100 assuming that the $100 price is not a dumping price. That problem can be dealt with by bringing a dumping case against the $100 price, and an artificial pricing case simultaneously against the imports from this hypothetical Poland.

Senator **Danforth**. But I thought the measure would be $100.

Mr. **Cunningham**. The measure would be $100 unless the $100 is a dumped price. If that is not clear in the legislation, it should be made clear. That a dumped price or a subsidized price from a free market country can't be the reference point.

Senator **Danforth**. But let's suppose that it's not dumped or not subsidized. Just suppose that one country is very efficient in producing things and does a very, very good job. We will call that hypothetical country Japan, and it produces things just a mile a minute. The lowest possible cost. It can produce this produce at $100, and the other hypothetical country produces it at $1,000, but it wants to just get rid of the product to keep people working, keep them happy. Aren't we getting ourselves in a bind—are we worse off with this bill or better off?

Mr. **Verrill**. I think, first of all, in your example, it is true that Poland would be able to sell at $100, and that countries that produce at $200, say Mexico or Venezuela, could not sell at the $100, in this country, they would have to sell at $200. Therefore, there would be an assumption that the nonmarket economy would be as efficient as the most efficient producer in the world, and they would be entitled to use those prices. I don't think, though, as a practical matter that that situation is likely to emerge. First of all, I think one of the assumptions of the nonmarket economy provision is that we will never really know what those costs would be in Poland if market forces played a role. We will never know even though we go and verify information. We will never know whether the costs that are recorded are real costs.

Senator **Danforth**. Wouldn't you know that whatever they are, that they are higher as opposed to free market economies?

Mr. **Verrill**. Only if you go through some very elaborate evaluations of what those costs are.

Senator **Danforth**. Isn't the assumption of the bill that a nonmarket country is more efficient as a producer than a free market country?

Mr. **Schwarz**. No, sir.

Senator **Danforth**. Why isn't that?

Mr. **Schwarz**. As far as I can see, I think your hypothetical points out another flaw in the bill. My suggestion, as I have indicated, is to let every producer stand on his own two feet. If the Japanese producer can make them at a mile a minute, he should be able to take advantage of that. If the Polish producer puts in five times as many labor hours, the system that we use to evaluate that is taking that into account; I think that he should be held to his own efficiencies or inefficiencies. If he is going to be inefficient, he should not be able to sell that product at $100. Putting aside the question of injury, he should have to sell it at $1,000, not $200 either.

Mr. CUNNINGHAM. I would just like to say that your hypothetical doesn't bother me. It doesn't bother me because if the Japanese are selling in here at $100, and the Poles meet the Japanese price, the Japanese are going to be the problem in the marketplace.

Senator DANFORTH. Will be the what?

Mr. CUNNINGHAM. The Japanese are the problem in the marketplace. The Poles are merely meeting a fair price. In at least one line of ITC decisions, it would be difficult to prove injury under those circumstances from Polish imports.

Senator DANFORTH. I didn't think we had the injury thing.

Mr. CUNNINGHAM. Well, I have problems with that part of the bill. You would under certain circumstances have to prove injury. But what I am saying is that the Polish imports aren't the problem that the U.S. industry is going to be worried about there unless they come flooding in in a massive volume in which case you still have an escape clause procedure, which covers not just their volumes but the total volume of imports. Relief can be obtained under that statute, and, indeed, that was the escape valve, as it were, that was done in one of the 406 cases. We shifted over to a 201 case.

I think we have, to some extent, a trade off that we have to deal with here. We have got a problem where we can't effectively apply our present laws to nonmarket economy imports. This bill gives us a way in most cases that one can do that. One can get relief for a U.S. industry. It is possible to conceive of certain situations where if one were able to determine what the Polish costs or the nonmarket economy costs really were—heck, this bill is allowing them to "dump." I'd rather take that trade off; get the relief that the bill provides in the vast majority of cases, and let go what I think is not a real problem. That is, the problem that this bill allows the nonmarket economy importer to meet other low prices in this marketplace because if there are other low prices in this marketplace, the problem of low pricing already exists anyway.

Senator DANFORTH. Well, I think, just on the face of it, that it gives the nonmarket economies a measure which is more favorable from their standpoint than it is in the real world.

Mr. CUNNINGHAM. I think the irony of this situation is that that is true. Yet, the bill gives much more relief to U.S. industries than they are now able to obtain under any statute. And I think it is the best compromise that we can get.

Senator DANFORTH. Thank you, very much.

Senator HEINZ. Mr. Chairman, I would like to propose one other question. The debate is very helpful and necessary. I think it was premised on, in my judgment, all assumptions that there are only two kinds of countries in the world, free market countries, and totally nonmarket countries where you can't tell anything about anything. It is my view that there are a group of countries currently consisting, in all probability, of Yugoslavia and Hungary, and had the military not moved in in that other hypothetical country that you mentioned, Poland, that in a relatively short time Poland might have been able to join that list.

I would like to ask the witnesses whether they would not agree that there is a third category of countries here that are mixed economies. That it is in our very best diplomatic trade, self-economically motivated interest to encourage those countries that we can encourage to move more and more into a free market approach. And my second question would be: Don't you think that this bill furthers that goal by giving them an alternative track, which is to provide information? Think about your cost of production. Seek to go countervailing or in all probability an antidumping kind of route, Mr. Cunningham.

Mr. **Cunningham**. I would answer your questions—yes, certainly, to the first. And maybe, I hope so, to the second. There are the problems in any of these countries of what is the validity of the data that they present. But I think the bill should contain some element of giving them an opportunity to show in essence that as to this product, they are not a nonmarket economy.

Senator **Danforth**. Thank you very much, gentleman. The next witnesses are Sholom Comay and John Heebner.

Senator Bradley has a list of questions for the witnesses.

SENATOR BRADLEY'S QUESTIONS FOR THE ADMINISTRATION (TO BE ANSWERED IN WRITING) FOR HEARING ON S. 958

1. The basic purpose of the antidumping law is to ensure that foreign goods are sold for use in the U.S. market generally at the same price as they are sold for use in the domestic market of the exporting country. Bearing this basic purpose in mind, wouldn't it make sense for the Commerce Department to determine a realistic exchange rate for each nonmarket country—an exchange rate based on a purchasing power analysis such as the CIA regularly performs? Couldn't the purchasing power exchange rate then be used to compare the domestic price of the allegedly dumped goods, assuming that that price is not an unreasonably artificial one, with the export price?

2. When an exporter from Eastern Europe or China is required to price his sales to the United States at the price of some third country exporter, particularly if this is the only third party exporter, doesn't this tend to promote an informal cartel between competing suppliers to the U.S. market?

3. Where the only free-market producer of a nonmarket country product sold in the United States is its U.S. competitor, S. 958 would require the imported product to be sold at the U.S. producers' price. For example, I understand this to be the case concerning montan wax imported from East Germany, a case where the dumping margin originally found by the Commerce Department has "disappeared" due to changed economic conditions. I believe S. 958's rule in such cases would conflict with the recently published GAO report that recommended that a constructed value option should exist in U.S. law for cases in which no third-country producer exists. In your view where there is no third-country free-market producer would application of the rule proposed under S. 958 create a monopoly price? Is it good policy to encourage monopoly prices with an antidumping law?

4. Do you think it is fair competition to use the price at which an advanced country sells a product in the United States as the surrogate for the "real" domestic price of that product in a nonmarket country? Should we treat some of nonmarket countries differently than others in this respect?

5. S. 958 provides at paragraph (C)(1)(A) that "whenever a nonmarket economy country which is the producer of an article which is the subject of an artificial pricing investigation under this section furnishes verifiable information to the administering authority in connection with such investigation which is sufficient, in the judgment of the administering authority, to permit the investigation to be conducted as a countervailing duty investigation or an antidumping duty investigation," etc., such an investigation will be undertaken. In your opinion, would a nonmarket country need to furnish not only cost and price information, but also evidence that goods are sold on a free market in the home country, that the currency of the nonmarket economy is convertible, and other information on the general operation of the nonmarket economy in order to qualify for such a judgment? Do you expect, for example, that under present circumstances any of the following countries could pro-

vide sufficient information to permit the use of home market or third-country prices for an antidumping investigation: East Germany, Poland, Hungary, the Soviet Union, the People's Republic of China?

6. Since: (1) present section 406 (which this bill seeks to replace) requires that actionable "market disruption" by a Communist country consists of imports increasing so rapidly as to be a significant cause of material injury, or threat of material injury, to the U.S. industry: and (2) the normal antidumping procedure, which this bill seeks to improve provides that injury to a U.S. industry must be shown, or the establishment of such an industry be materially retarded; then: (a) ought not any such proposed remedy be required to include the traditional showing of injury to the domestic U.S. industry? If not, why not? (b) Is this not especially true as applied to those countries which are or become parties to the GATT antidumping agreement? How would we handle our treaty obligations to these countries if S. 958 became law?

7. In your view is the proposed definition of "nonmarket economy country" workable? The definition reads: "* * * any country the economy of which, as determined by the administering authority, operates on principles other than those of a free market to an extent that sales or offers of sale of merchandise in that country or to countries other than the United States do not reflect the fair value of the merchandise." It appears tautological. Can such a test be applied reliably?

8. In your view, would the bill tend to encourage the People's Republic of China and the countries of Eastern Europe to move toward free market principles, or would it tend to discourage them by summarily placing them in "artificial pricing" category?

DEPARTMENT OF COMMERCE RESPONSE TO THE QUESTIONS POSED
BY SENATOR BRADLEY IN CONJUNCTION WITH THE
SENATE FINANCE COMMITTEE HEARING ON S.958,
JANUARY 30, 1982.

Question #1

In normal cases, the antidumping law calls for a comparison of a foreign manufacturer's price on merchandise sold in the U.S. to the price of such or similar merchandise produced by the same manufacturer and sold in his home market or in third countries. Under certain circumstances the U.S. price is also compared to the foreign manufacturer's cost of production.

A comparison of U.S. prices to prices or costs in the home country is generally not performed when the home country is a non-market economy country for a variety of reasons. One of the hinderances is the absence of a credible exchange rate. Other reasons are the non-market economy producer's general inability to react to supply and demand forces because his input and/or output prices may be determined by the government. Also, access to major markets for the purchase of inputs or sales of the output may be severely restricted.

Since an enterprise in a non-market economy country may lack essential control over its production functions, costs, and revenues, any price and cost comparisons which seek to uncover price discrimination and the resulting cross-subsidization of low-priced U.S. sales may lack meaningfulness in both an economic and a commercial sense. The difficulty posed by an inconvertible exhange rate is not the only hurdle but simply one of many.

Question #2

The pricing scenario described in this question is an accurate statement of one method of determining "fair value" under our current antidumping law. This approach was most recently used in the dumping case concerning menthol from the People's Republic of China. In this case the "fair value" of menthol imports from China was deemed to be the U.S. price of menthol imports from Paraguay. We have no evidence that investigations and duty assessment under the state controlled economy provision of the antidumping law promoted cartel-like commercial behavior in the past or will in the future.

Question #3

It is our understanding that the rule currently proposed in S.958 would set the "artificial price", in the factual situation described in the question, at the price of the sole U.S. producer. We would recommend that if there was only one participant in the U.S. market (other than the NME producer) as in the montan wax case, a fair import price standard be developed with reference to the market producer's costs rather than price. This would be equivalent to calculating a constructed value under our present antidumping law. In this way the artificial price would be pegged to the U.S. producer's cost, an item which a profit-oriented firm seeks to minimize, rather than his price, which might tend to rise in the absence of competition. In this way we believe the negative aspects of the lack of unrestrained price competition would be mitigated. By contrast, the optional use of a fictitious value based on the non-market producer's inputs priced in some Department of Commerce-designated surrogate country as suggested by the GAO, would simply leave open the uncertainty and possibilities for abuse present in the current law.

Question #4

The present law places the fate of U.S. producers and non-market producers (at least insofar as their U.S. sales are concerned) in the hands of surrogate third country producers or surrogate countries. This is clearly a less than perfect measure of fair value. Still, if one believes that U.S. producers should have rights to a non-discretionary remedy under our unfair trade laws without regard to the country of origin of their import competition, and that non-market economy producers should have some access to our market, we must find a non-discretionary standard which can be reasonably applied.

If we could accurately determine the "real" domestic price and felt comfortable that it was meaningful in a dumping context, we would use it. This is true both under the current antidumping law and under S.958 as we read it.

Question #5

We believe that there may be or may develop enterprises in any non-market economy (including conceivably the named countries) which are market-oriented to a degree sufficient as to make their prices and/or costs meaningful in a dumping context. We would want to see evidence of a firm's ability to bargain for input prices, set and change output prices to reflect glut or scarcity, and alter their production functions through, for example, hiring/firing workers and selling of capital assets. They should be able to reap the benefits of their commercial successes, but also be responsible for their commercial failures.

Question #6

We believe that any remedy to an unfair trade practice should be in agreement with our international obligations and consistent with the present dumping and countervailing duty laws. We believe that subsidy-type complaints should carry an injury requirement consistent with our commitments policy. Dumping-type complaints of unfair pricing in the U.S. market should continue to carry a requirement of showing injury.

Question #7

The definition appears workable with some slight changes of language. Specifically we would like it to read, "The term 'nonmarket economy country' means any country the economy of which, as determined by the administering authority, operates on principles other than those of a free market to an extent that sales or offers of sale of merchandise in that country do not reflect the fair value of the merchandise, or subsidies bestowed upon the merchandise cannot, in general, be adequately measured.

Question #8

In general, the bill would do neither. What S.958 would do is allow non-market economy producers some access to our market while preserving U.S. industry's right to a non-discretionary remedy to unfair trade practices (just as the normal antidumping and countervailing duty procedures provide a remedy against imports from market economies isolated from discretionary review). Both groups would be helped because S.958 is less complex and cumbersome and more predictable than our present law.

STATEMENT OF SHOLOM D. COMAY, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, ACTION INDUSTRIES, INC., CHESWICK, PA.

Mr. **Comay**. Thank you, Senator. And may I thank the committee for this opportunity to appear.

I have submitted a prepared statement, which I would like to summarize if I may.

Senator **Danforth**. All prepared statements are automatically included in the record.

Mr. **Comay**. Thank you. I would like to, if I can, briefly summarize the major points of my response, representing a company which is an importer from one of the countries in question. In fact, from a number of the countries in question. I have four major points I would like to make.

First is that the concept of artificial pricing is itself, in my judgment, a concept of questionable economic soundness. And I am worried as to that concept that it is anticompetitive in nature in that it sets a minimum floor price for an item.

Second, I am concerned, as many of the speakers of this morning have been, about the absence of an injury test. I think that particularly under the GATT antidumping agreement that such an absence is not wise.

Third, I am concerned with the vagueness of the definition of nonmarket economy.

And, finally, just as a general comment on the bill, I am concerned with the vagueness of all of these items as they must be interpreted by an American importer seeking to pay a fair price for a product that he is going to bring into this country, and not knowing from these definitions whether the price that he negotiates will, in fact, subject him to penal duties.

On the question of artificial pricing, I am, as I indicated, most concerned that the more efficient producer in a so-called nonmarket economy will be forced, in fact, to raise what would be a fair price of his product in order to sell that product in the United States under the definition contained in this bill. I simply think that fixing a minimum price is bad public policy.

One of the earlier witnesses from the administration, I believe it was the gentleman from the GAO, indicated that there ought to perhaps be a supplement to this test in that a foreign producer who could demonstrate more efficiency in his own production ought to be allowed to show that to justify a price lower than a price otherwise prevalent in the market economy.

In terms of the injury test, I feel that it is most unfair to hold an importer or a foreign exporter to a penal duty where no harm can demonstrably be shown to U.S. producers or to a domestic industry. I think this is particularly offensive as concerns imports from countries which are parties to the GATT antidumping agreement. And which justifiably expect to be entitled to an injury test, antidumping-type consideration.

As to the definition of nonmarket economy, the country which we principally deal with is Hungary. And as Senator Heinz has pointed out, there are a group of countries, of which Yugoslavia and Hungary come quickly to mind, which are, in fact, moving as rapidly as I think one could expect them to toward introduction of market forces in their economy. I know that just a few days ago that the latest report of the ITC to Congress on a nonmarket economy pointed out:

> That for years, Hungary has been in the forefront among the centrally planned economies in introducing market forces. Actions taken by the Hungarian Government have included the decentralization of decisionmaking an incentive system for managers and workers and price reform.

And I pointed out in my prepared statement an article in Business Week that pointed out the Hungarians are seeking to have the first convertible currency in the Communist bloc.

I think these are good things. My company tries to encourage our trading partners to move in these directions. I think that the definition of nonmarket economy should go much further than it does in providing incentives to other countries who adopt these kinds of forces in their economy.

Finally, I am concerned, representing a company that does a great deal of importing from what might be defined as nonmarket economies, that we are not being provided with very definite guidelines in doing business around the world. The concept of lowest average price, which has built into a number of adjustments in the market economies, which are themselves very difficult to define, is one which I do not think that any American buyer can safely apply before it negotiates a contract. And I think as American businessmen seeking to do business elsewhere in the world—are entitled to more guidance than is provided by these very, very vague definitions.

I do, however, support the idea of the legislation to replace the section 406 with normal principle antidumping and countervailing duty cases. That makes it much easier to understand the principles that will be applied. We think, however, that the artificial pricing test is an unfounded one. And that the absence of an injury test in an artificial pricing proceeding, a proceeding which has moved to artificial pricing as a test—we think the absence of the injury test is unfair.

[The prepared statement follows:]

TESTIMONY OF SHOLOM D. COMAY
BEFORE
U.S. SENATE COMMITTEE ON FINANCE
SUBCOMMITTEE ON INTERNATIONAL TRADE
RE: S.958
JANUARY 29, 1982

I AM SHOLOM D. COMAY, SENIOR VICE PRESIDENT AND GENERAL COUNSEL OF ACTION INDUSTRIES, INC., CHESWICK, PA. 15024.

I ALSO SERVE AS A DIRECTOR AND SECRETARY OF ACTION TUNGSRAM, INC. OF EAST BRUNSWICK, N.J. 08816.

ACTION TUNGSRAM IS A U.S.-HUNGARIAN JOINT VENTURE IN THE U.S.A. WHICH MANUFACTURES, IMPORTS AND DISTRIBUTES ELECTRIC LIGHT BULBS, AND EXPORTS MATERIALS FROM THE U.S. TO HUNGARY.

THE PARENT COMPANY, ACTION INDUSTRIES, IN ADDITION TO OUR U.S. MANUFACTURING AND PURCHASING, ALSO IMPORTS FROM MANY OTHER COUNTRIES THROUGHOUT THE WORLD, INCLUDING YUGOSLAVIA AND THE P.R.C. (CHINA). WE HAVE, THEREFORE, A DEEP INTEREST IN THE LEGISLATION YOU ARE CONSIDERING TODAY (S.958).

WE SURMISE THAT, WHEREAS CHINA PROBABLY WOULD BE CLASSIFIED AS A "NONMARKET ECONOMY" UNDER THE PROPOSED LEGISLATION, YUGOSLAVIA PROBABLY WOULD NOT. WE NOTE IN THIS REGARD THAT THE SEPTEMBER 1981 QUARTERLY REPORT OF THE INTERNATIONAL TRADE COMMISSION TO THE CONGRESS ON TRADE BETWEEN THE UNITED STATES AND THE NONMARKET ECONOMY COUNTRIES STATES:

> The previous reports in this series have included Yugoslavia among the nonmarket economy countries whose trade with the United States is monitored. At the suggestion of the United States Trade Representative, and after consultation with the appropriate congressional committees, the Commission has decided that Yugoslavia will no longer be included in the countries covered by this report. In the opinion of many analysts, Yugoslavia is not appropriately classified as a nonmarket economy country. Also, it is not a member of the Warsaw Pact or the Council for Mutual Economic Assistance. It is a contracting party to the General Agreement on Tariffs and Trade (GATT), and a member of the International Monetary Fund and the World Bank....

As to Hungary, we note that Business Week magazine for November 16, 1981 reports that:

> ...Hungary (is) to apply to join the International Monetary Fund and World Bank. Hungary runs a semimarket-oriented economy, intends to have the first convertible currency in the Communist Bloc, and has a good credit rating.

Hungary is, of course, also a full member of the GATT. We ask, then, is Hungary a "nonmarket economy" as defined in the bill before you? The facts would seem to indicate it is not.

MOREOVER, SINCE THE PROPOSED LEGISLATION DEFINES "NONMARKET ECONOMY" IN TERMS OF THE PRICE OF MERCHANDISE IN GENERAL, WE SUGGEST IT WOULD HELP TO CLARIFY THIS ISSUE IF THE DEFINITION WERE TO FOCUS ON THE "FAIR VALUE" OF SALES OF THE SPECIFIC MERCHANDISE UNDER CHALLENGE.

WE SUPPORT THE REPLACEMENT OF PRESENT SECTION 406 WITH THE NORMAL RULES OF PROCEEDING UNDER ANTIDUMPING AND COUNTERVAILING DUTY CASES. THIS IS CONSISTENT WITH SENATOR HEINZ'S INTRODUCTORY REMARKS THAT "THE LEGISLATION SHOULD, WHERE POSSIBLE, TREAT NONMARKET ECONOMIES LIKE ANYONE ELSE." WE, LIKE SENATOR HEINZ, "BELIEVE IT IS IN OUR LONG-TERM INTEREST, AS WELL AS THAT OF THE NONMARKET ECONOMIES, TO ENCOURAGE THEM TO DEVELOP THE ATTRIBUTES OF MARKET ECONOMIES" (CONGRESSIONAL RECORD-SENATE, S.3782; APRIL 9, 1981). HOWEVER, WHEN THE PROPOSED LEGISLATION MOVES BEYOND ANTIDUMPING AND COUNTERVAILING DUTY TO THE NEW CONCEPT OF "ARTIFICIAL PRICING," WE HAVE VERY SERIOUS RESERVATIONS.

INITIALLY, WE QUESTION THE IMPLICIT NOTION THAT THE "LOWEST FREE-MARKET PRICE" IS BY DEFINITION THE LOWEST "FAIR VALUE OF THE MERCHANDISE," SO THAT A LOWER PRICE FROM A "NONMARKET ECONOMY" IS DEFINED AS ARTIFICIAL. THAT IS NOT LOGICAL. A MORE EFFICIENT PRODUCER OF LIGHT BULBS, SAY, IN HUNGARY, MAY WELL OFFER THOSE ITEMS FAIRLY AT A LOWER PRICE THAN LESS EFFICIENT PRODUCERS IN MARKET ECONOMIES. IN SUCH A CASE, IT IS THE "LOWEST FREE-MARKET PRICE" WHICH WOULD, IN GLOBAL TERMS, BE ARTIFICIAL. WE BELIEVE IT TO BE BAD PUBLIC POLICY TO SET A FLOOR PRICE FOR ANY ITEM WHERE THERE ARE PRODUCERS IN THE WORLD CAPABLE OF MAKING AND FAIRLY SELLING THAT ITEM FOR LESS.

WE ALSO SERIOUSLY QUESTION THE WISDOM AND FAIRNESS OF AN "ARTIFICIAL PRICING" TEST WHICH DOES NOT REQUIRE THAT INJURY BE DONE.

WITHOUT INJURY THERE IS NOT HARM TO THE DOMESTIC ECONOMY, AND WITHOUT HARM THERE SHOULD BE NO CAUSE OF ACTION. THIS IS PARTICULARLY DISTURBING WHEN A HIGHLY CONCENTRATED DOMESTIC INDUSTRY OF THREE OR FOUR GIANT COMPANIES IS ENCOURAGED TO EXCLUDE FROM THE MARKET A MUCH SMALLER BUSINESS WILLING TO OFFER LOWER PRICES AND BETTER VALUE. YET JUST SUCH EXCLUSION IS INVITED BY LEGISLATION WHICH CREATES A REMEDY WITHOUT REQUIRING INJURY TO BE SHOWN.

THE PROPOSED DEFINITION OF "LOWEST FREE-MARKET PRICE" LEAVES MUCH TO BE DESIRED. HOW CAN AN IMPORTER POSSIBLY KNOW WHAT IS THE LOWEST AVERAGE PRICE, ADJUSTED IN A NUMBER OF WAYS, CHARGED FOR LIKE ARTICLES BY PRODUCERS IN FREE-MARKET COUNTRIES? IF HE BUYS FOR LESS FROM A NONMARKET ECONOMY (DIFFICULT IN ITSELF TO DEFINE) HE RISKS POTENTIALLY RUINOUS PENALTY DUTIES, WHETHER OR NOT HIS BEHAVIOR CAUSES INJURY IN THE U.S. THIS PROCEDURE SCARCELY MEETS ELEMENTARY STANDARDS OF DUE PROCESS.

THE DEFINITION OF "LIKE ARTICLE" SEEMS TOO BROAD. IF THERE IS NO "LIKE ARTICLE," THEN THE ACTION FOCUSES ON THAT ARTICLE WHICH IS "MOST SIMILAR IN CHARACTERISTICS AND USES" TO THE ARTICLE UNDER ATTACK. WHY SHOULD ANY ACTION LIE WHEN THERE IS NO LIKE DOMESTIC ARTICLE?

IN SUMMARY, WE SUPPORT THIS BILL INSOFAR AS IT REPLACES THE PRESENT SECTION 406 WITH ACCEPTED PRINCIPLES OF ANTIDUMPING AND COUNTERVAILING DUTY LAW. WE SUPPORT THE STATED PURPOSE TO TREAT DIFFERENT ECONOMIES EQUALLY. BUT WE BELIEVE IT TO BE UNWISE TO ESTABLISH A MINIMUM PRICE FOR GOODS FROM CERTAIN COUNTRIES, AND UNFAIR TO IMPOSE PENALTY DUTIES WHERE NO INJURY HAS BEEN SHOWN.

THANK YOU.

STATEMENT OF JOHN C. HEEBNER, PRESIDENT, BUFFALO CHINA, INC., BUFFALO, N.Y.

Mr. HEEBNER. We have asked to testify here because our industry is one of those that is being impacted by the imports from the low-wage and the nonmarket economy. Senator Heinz's bill does not by any means solve all the problems of our industry, but I personally think it will help. And we think that it does move in a more equitable direction.

The concept of artificial pricing and the use of the lowest free market price, in our opinion, is a rather direct way of avoiding the complications and the problems of trying to develop reliable data and cost price relationships from a nonmarket economy.

We do have a problem with the injury test. The china manufacturers in this country are small industries by most standards, and the injury test, in my way of looking at it, becomes an after the fact review of data. And for a large company, they can withstand that kind of loss of business. But for a small company, it is sort of a case where the horse is out of the barn. And we do think that if it can be developed that the thread of injury could hold more weight in an argument of this kind, it would be greatly helpful to industries that have small companies in them.

Our market is particularly impacted by the imports from the People's Republic of China and Poland. And in the case of the People's Republic of China, the growth there has been explosive. They were a minor part of the market in 1979. In 1980, they became a very major factor. And in 1981, by my own estimates, they are the leading supplier to the U.S. market. And if this keeps up, it will only be a matter of a year or two before they force many companies out of business.

Now I do have a problem with this. And perhaps it is a personal view. But it does seem to me that there is an inconsistency. That we have gone to great lengths in the United States to preserve competition in a free market. And we have enacted and developed antitrust laws over the years, which I think on balance have been very effective in providing an environment in which small companies can outgrow and prosper. And now it does seem to me that there is an inconsistency when we will allow a foreign government to come in and if not price predatorily, price in a predatory fashion to dominate a market. And, today, if there were an American cartel or a large American company that attempted that kind of thing, it would be unlawful. And it does seem to me that there is an inconsistency there that needs to be dealt with.

Now I am not a lawyer. I am an engineer and a businessman, and I don't understand the technology of the law. But I do understand this business, the commercial china business. And I do know that there are a number of companies that are going to be injured because large or foreign governments are able to compete in our marketplace.

[The prepared statement follows:]

UNITED STATES SENATE
COMMITTEE ON FINANCE
Subcommittee on International Trade

Public Hearing
Dirksen Senate Office Building
Room 2221
November 19, 1981

S.958
A bill to amend the Trade Act of 1974 to provide special remedy for the artificial pricing of articles produced by nonmarket economy countries.

John C. Heebner
President, Buffalo China, Inc.
on behalf of
American Restaurant China Council
328 N. Pitt Street
Alexandria, Va. 22314
(703) 548-2588

Mr. Chairman, my name is John C. Heebner and I am President of Buffalo China, Inc. located in Buffalo, New York. I am appearing here today on behalf of the American Restaurant China Council which is a trade association representing the majority of American manufacturers of Hotel and Restaurant china. The members of this association are:

Buffalo China Inc.
Coors Porcelain Co.
Mayer China Co.
Shenango China Co.
Sterling China Co.
Syracuse China Corp.

With me is Irving J. Mills, the Executive Director of the A.R.C.C. Our products are identified as TSUS 533.20 and 533.52.

We have asked to testify here today because foreign imports, particularly from the low wage and nonmarket countries, have severely impacted our market and are increasing at an explosive rate. The remedial concept in S.958 is important to us because it provides a more realistic method for both small and large companies to cope with the subsidized exports from nonmarket countries.

The present antidumping laws do not present a realistic defense for American companies because we have found that it would take six months, at a cost of about $150,000 just to determine if we had a qualifying dumping case. Such expense is only possible for large companies or large trade associations. The investigative process is complex because the measurement of the full cost of production in a nonmarket country is difficult even if they are willing to cooperate.

.....continued

In my opinion, their accounting systems probably are not profit oriented, the socially related costs of employment will not be adequately reflected and their capital costs understated, if not ignored. The manufacturing cost for an American company is more easily identified because the company is an operating entity in and of itself.

The concept of "Artifical Pricing" as posed in S.958 will help significantly in resolving these problems with the antidumping law. There is no easy answer, however, to the question of the lowest "Free Market" price because government subsidies exist in many different forms in most foreign nations, particularly for exported products.

The American Hotel and Restaurant china industry employs only about 5,000 people throughout the U.S.A. Although our factories are modern and as efficient as any in the world today, we are vulnerable to imports from low wage countries because of the labor intensity still inherent in ths process. As individual manufacturers, we have offset some of the foreign wage differentials through capital investments, research and marketing programs. However, we have little defense against the artificial export prices created by government subsidies in the nonmarket countries.

The American market for Hotel and Restaurant china has not lacked strong domestic price competition which assures a fair price for the consumer. The American industry has always had excess capacity except during the few occasions when the American economy has been "overheated" as it was in

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1975-76. I estimate that today, the domestic china industry is operating at no more than 60% of its capacity.

The price competition has not been limited to competition from china manufacturers alone. There have been many other products competing for the commercial tabletop market where formerly only china was used. There are two large glass companies, Corning Glass Works and Anchor Hocking Corporation manufacturing glass dishes in large quantities for this same market. There are many large paper, chemical and oil companies manufacturing disposable paper and plastic products. There are innumerable companies of all sizes making tableware items of wood, metal and plastics. We estimate that sales by all American manufacturers of china amount to less than 60% of the products used on the commercial tabletop and do not dominate this market. The market has been so price competitive that at times capital investments in new equipment and facilities have been difficult to justify.

Further penetration of our market by subsidized imports from the nonmarket economies of the world will increase unemployment in areas already high in unemployment. In Buffalo, New York the unemployment rate is 12% and is impacted by seven automobile plants, two steel mills and all their associated industries. The New Castle, Pennsylvania area has two automobile plants, four major steel mills and the many associated industries and an unemployment rate of about 12%. The Youngstown, Ohio area has five steel mills, two automobile plants and an unemployment rate of 15%. The East Liverpool area has two steel mills and an unemployment rate of 14%.

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In the last 25 years, some 30 manufacturers of household china have gone out of business primarily because they could not meet the price levels of imported china sold in the retail market. I hope the Hotel and Restaurant china industry will be spared such a disaster. Continued erosion by subsudized prices from foreign sources will cause domestic manufacturers of Hotel and Restaurant china to lose a major portion of their market and some will be forced to close their plants. Others, will not be able to fund modernization programs and will then be unable to meet their union negotiated payroll costs within five years.

The anti-trust laws were enacted in the U.S.A. to control, among other things, unfair competition, prevent restraint of trade, prevent market dominance by cartels and, in general, stimulate competition by creating an equitable environment in which small companies could compete. The manufacturing concern in a nonmarket country has a riskless investment, it cannot go bankrupt and it probably has no price competition in its home market. In some cases, there is no domestic market for the export product, as in the Golf Cart case in Poland. In effect, the small American company is now required to compete for survival in the American market against a foreign government.

It is difficult to define a nonmarket economy country in the context of their competition in the American marketplace because our system is quite unique in the world today. We must recognize that where government control exists, to any degree, the resulting subsidy does affect the F.O.B. price level of

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their exported products and they should be classified as "Artificially Priced" in the context of S.958.

The imports from the nonmarket countries are also trade distorting when they simply copy the high volume products being sold in the U.S.A., produce them in their controlled economies and then price them predatorily in the U.S.A. to dominate the market. In the Hotel and Restaurant market in the U.S.A. the Peoples Republic of China and Poland have based their business on copies of numerous high volume patterns being sold by the domestic producers. They have added nothing technically to the product nor have they produced innovative designs. Imports from the Peoples Republic of China have increased at an explosive rate since they received MFN status in February 1980:

	Dutiable Quantity	Average Price Per Dozen
1975	1,872 Dozens	$3.88
1976	16,228 "	1.42
1977	23,912 "	1.79
1978	44,812 "	2.68
1979	32,776 "	3.08
1980	520,340 "	2.42
(9 months) 1981	1,234,010 "	1.11

(Source: Department of Commerce)

At this rate, Peoples Republic of China will ship at least 1,600,000 dozens into the American market in 1981. I believe they have already become the largest supplier in the American market for Hotel and Restaurant china in the 22 months since they received MFN status. Not only is their product line limited to copies of the domestic manufacturers' product lines, but they advertise it as such. The dutiable price F.O.B. the Chinese port of $1.11 per dozen for 1981 is the lowest of all

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imports. It is so low that we don't believe it can be based on manufacturing cost even with a reported labor rate of $.30 per hour. We find it especially difficult to understand the average price of $0.50 per dozen reported for 930,703 dozens classified as TSUS 533.20 in the 1,234,010 total. American manufacturers cannot compete with this price level even though our productivity is six to their one.

Three different sources have stated that in the Peoples Republic of China, the export prices are set by the government rather than establised by cost. First is the report by 17 representatives of the American Ceramic Society published in the September 1980 issue of the "Ceramic Bulletin." Second is the consulting report written by Ernst & Whinney for the A.R.C.C. and third is the June 1981 seminar entitled "Doing Business in China" presented jointly by senior representatives of China's Ministry of Finance and Foreign Investment Commission and Ernst & Whinney in Chicago.

I do hope that in your deliberations surrounding S.958 you will consider the fundamental problem created by our standard of living compared with other trading nations. For many decades, there has been a determined effort in the U.S.A. to enact wide ranging laws that would enhance the standard of living of the industrial worker. We now have the highest standard of living in the world. I think we must find an equitable way to trade with the world without putting the American industrial worker on the unemployment roles.

I wish to commend Senator Heinz for his work in this complex and controversial area of international trade. His bill S.958 is an important one and a move in a more equitable direction.

Thank you.

Senator DANFORTH. Gentlemen, thank you very much. Senator Heinz.

Senator HEINZ. Mr. Chairman, thank you. An observation: I suppose it is somewhat encouraging that some people think that the artificial pricing test is going to let everybody in through the door. And the other people think, such as my valued constituent, Mr. Comay, that it isn't going to let anybody through the door. I guess that's the trouble with having a screen door. Something always gets through it, but you try to keep the biggest offenders and things that are a little larger than gnats out.

I listened with interest to Mr. Comay, Cheswick, Pa., being a stone's throw from my backyard. He argued quite eloquently about the conundrum of when we are going to be discriminating against a nonmarket economy. I think the honest answer to the question is that we are never going to know. We are never going to know. And, fundamentally, the choice here is whether you believe that free market economies are fundamentally more efficient than nonmarket economies. That's a choice that, at least, is easy for me to make. But I would like to know if you know, Mr. Comay, how in real terms we can ever get any information to prove, particularly given current circumstances, that there might be somewhere a nonmarket economy that is more efficient than a free market economy?

Mr. COMAY. Senator, I think that that kind of a determination is best made in the context of the particular merchandise under attack in such a proceeding. I think that the producer of the merchandise ought to have the opportunity to produce factors such as cost of production and other competitive market-type factors. I think that sometimes the inadequacy of information supplied is more in the nature of a difference in accounting techniques that are used than it is in any unwillingness of the foreign exporter to provide such information. But in our case, and we have litigated a dumping case on the items and one on the items that we import—they happened to be electric light bulbs. We have, I believe, the second oldest producer of light bulbs in the world; the first company to put the tungsten filament in a light bulb; and what may well be the largest single light bulb factor in the world. And we believe that there are such efficiencies attendant upon those circumstances that we at least ought to be able to prove that if we can undersell producers in the free market countries, it's for a good fair reason. We are selling for the fair value of our product.

Senator HEINZ. Well, let me ask you this. You took exception to the artificial pricing concept that we use here. But the alternative is what we are doing under current law which is to go out and pick some kind of allegedly comparable country. Which is a better choice? Do you prefer it the way we do it now, or do you think my approach is better?

Mr. COMAY. Senator, I am certainly no proponent of the comparable country. That's a nightmare for everybody involved in one of these cases. I don't think you will find anyone seriously disagreeing with that. What I would like to see as an importing country is, if you will, an escape clause from the concept of artificial pricing. In that, if a foreign producer can demonstrate such efficiencies as make a lower price, then, his free market competitors fair value for the goods, he ought to be able to introduce such evidence and to prevail on such evidence if it is persuasive.

Senator Heinz. Mr. Heebner, I thank you for your comments in support of the legislation. Your industry has a number of very important manufacturing facilities in my home State, among them Shenango, which is not very far away from Cheswick as the crow flies, but as our roads go, it would be quite lengthy. I heard what you had to say and your closing comment. It is a good question, but it is probably not one really within the scope of this hearing or this bill. I am hopeful we will be able to address that on another occasion. But I thank you for your testimony.

Senator Danforth. Gentlemen, thank you. The next witnesses are Elizabeth Jager and Stephen Koplan.

STATEMENT OF STEPHEN KOPLAN, AFL-CIO

Mr. Koplan. Mr. Chairman, I'm going to summarize my testimony. I would ask that the full text appear in the record at the conclusion of my oral presentation.

I have with me this morning Elizabeth Jager, trade economist in our department of economic research. And she probably also will be commenting on the bill. Thank you.

The AFL-CIO appreciates the opportunity to discuss a major problem left unresolved during the multilateral trade negotiations of 1979—the issue of how to correct dumping and market disruption caused by such practices as countertrade and artificial pricing of articles produced by Communist countries or other nonmarket economy countries.

S. 958 represents a useful vehicle to reopen debate and consideration of these problems. Unfortunately, S. 958 does not provide an adequate remedy for injurious imports from Communist and other nonmarket systems.

Nonmarket trade has already had serious effects on the U.S. economy and on specific industries. But neither the size nor the impact of this trade is monitored by the Government in accurate detail.

The 1974 Trade Act defines nonmarket economies as those that are dominated or controlled by communism. It requires the U.S. International Trade Commission to monitor trade with certain nonmarket economies. For the first time, it is our understanding that the United States has dropped Yugoslavia from that list. And we would note that we do not agree with that decision.

Market disruption caused by U.S. trade with nonmarket economies is far more complex than a simple examination of artificial pricing practices by those countries would reveal—lopsided countertrade deals are equally disruptive yet do not fit into the modest protection afforded by existing trade laws and policies which are geared to market economies and a supposedly free trade philosophy.

Foreign countries and companies pressuring for these agreements simply do not pretend to practice either free trade or to follow the underlying principles of the market economy.

Artificial pricing is indigenous to nonmarket economies because their prices are Government controlled, and their economies are

Government planned—with heavy subsidies. And, therefore, they are not reflective of an interplay between supply and demand. Production costs are not susceptible to real measurement. Their sales are not based on traditional market factors such as costs and profits. Their aim is to push exports as a source of foreign exchange or barter to aid in internal industrial development or other governmental policies. For these reasons, a free trade country ends up playing Russian roulette when trying to make the price comparisons necessary to establish dumping.

The present law definition of nonmarket economies is clearly not adequate. We recommend that additional language be added to present law so as to include coverage of sales by Government controlled and planned economies along with Communist countries now covered by definition. In this regard, we do not think it is necessary to scrap the current definition of a nonmarket economy, as proposed by S. 958, and start from scratch, but rather we prefer to build on the current definition to reflect the fact that nonmarket economies are not only Communist countries but also include government planned, heavily subsidized economies. Current law is totally inadequate for taking care of these problems. Both the GATT and U.S. law are geared to free market economies.

S. 958 would permit an interested party, as defined in current law, to file a complaint alleging artificial pricing against a nonmarket economy. If the respondent country provides verifiable information sufficient to permit a normal countervailing duty or antidumping investigation, then the investigation will be conducted without regard to whether an industry is injured or to whether the establishment of an industry is materially retarded. In other words, the current concept of section 406 of the 1974 Trade Act would cease to exist. And I note one of the witnesses commented on that just before me. And instead, it would be redesigned to deal with unfair trade practices rather than market disruption. The purpose for dangling this carrot in front of a nonmarket economy is that in the long term it might encourage it to develop the attributes of market economies. The other side of the coin, the stick, is that if verifiable information is not supplied sufficient to conduct such an investigation, then an artificial pricing investigation will commence.

I think, Senator Danforth, you brought out this morning in your questioning that it is impossible to get verifiable information from such countries.

Assuming an artificial pricing investigation, it will be defined to exist "whenever an article, like an article produced by such domestic industry, is imported directly or indirectly from a nonmarket economy country or countries at a price below the lowest free market price of like articles." We oppose this approach because it calls for nonobjective bureaucratic determinations. For example, how can there be an objective determination of verifiable information obtained from a state-controlled economy under consideration in an adversary proceeding? It would be preferable to retain and effectively enforce market disruption, the concept embodied in section 406, as determinative. We make this recommendation because it's the sale by the nonmarket country, not the country standing alone, that adversely affects U.S. producers and workers.

Moreover, the propo d definition of artificial pricing fails to take into account the f t that the United States is disadvantaged uniquely in East/West lations. European countries have bilateral quotas to prevent marl t disruption, while the United States has remained open to non arket countries. The only realistic free market measure for a nmarket import is the average U.S. price for that product. Anyth g else would encourage imports from nonmarket economies to tl detriment of U.S. production. For example, artificial pricing s uld not be determined on the basis that the Taiwanese sell a e article at a price equal to or slightly below that of a nonmar et economy.

We suggest that the referable course of action is to follow the lead of the European untries by preventing market disruption rather than attemptin simply to paper over the problem after it has occurred. At the v y least, the average U.S. price would be a fairer and more accura measure.

We would welcome he opportunity to work closely with the members of this subco mittee in your efforts to find legislative solutions to these comple problems.

Certainly, S. 958 is s ving the purpose of raising general awareness that there is a n d for prompt action. We cannot afford to leave unattended marl t disruption resulting from unbridled trade with nonmarket count es. The AFL-CIO, therefore, calls for complete and accurate rep ting of all nonmarket trade. The need for an effective and basic st with prompt action is long overdue.

[The prepared staten nt follows:]

STATEMENT OF STEPHEN KOPLAN, LEGISLATIVE REPRESENTATIVE, DEPARTMENT OF LEGISLATION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS BEFORE THE SENATE FINANCE SUBCOMMITTEE ON INTERNATIONAL TRADE ON S. 958, A BILL TO AMEND THE TRADE ACT OF 1974 TO PROVIDE A SPECIAL REMEDY FOR THE ARTIFICIAL PRICING OF ARTICLES PRODUCED BY NONMARKET ECONOMY COUNTRIES

January 29, 1982

The AFL-CIO appreciates the opportunity to discuss a major problem left unresolved during the Multilateral Trade Negotiations (MTN) of 1979 -- the issue of how to correct dumping and market disruption caused by such practices as countertrade and artificial pricing of articles produced by communist countries or other nonmarket economy countries. In this regard, S. 958, a bill introduced last April by Senator Heinz to amend the 1974 Trade Act to provide a special remedy for the artificial pricing of articles produced by nonmarket economy countries, represents a useful vehicle to reopen debate and consideration of these problems. Unfortunately, S. 958 does not provide an adequate remedy for injurious imports from communist and other nonmarket systems.

Nonmarket trade has already had serious effects on the U.S. economy and on specific industries. Imports of light bulbs, golf carts, shoes, steel items, glass, and textiles have often come in at prices based on political considerations that undercut U.S. production. In addition, sudden surges -- from twenty six thousand dozen (312 thousand) to over a hundred thousand dozen (1.2 million) sweaters from China in 1980, for example -- can cause serious problems in the U.S. of lost jobs and production.

But neither the size nor the impact of this trade is monitored by the government in accurate detail. (See attached).

The 1974 Trade Act defines nonmarket economies (NME's) as those that are dominated or controlled by communism. It requires the U.S. International Trade Commission to monitor trade with certain NME's. At present, those listed for monitoring include: Albania, Bulgaria, Cuba, Czechoslovakia, East Germany, certain parts of Indochina such as Vietnam, North Korea, the Kurile Islands, Latvia, Lithuania, Mongolia, Southern Sakhalin, Tanna Tuva, and the U.S.S.R. In addition, four communist countries receiving most-favored-nation (MFN) tariff treatment are also monitored: Hungary, China, Poland, and Romania. For the first time, the U.S. has dropped Yugoslavia from that list.

As commonly understood, countertrade is a method long used by nonmarket countries to avoid paying cash for imported products. Years ago, it was most frequently used by Eastern European countries, but such deals are now being forced upon a wide range of countries, including the United States, despite the fact that historically U.S. firms preferred straight cash deals. Recently, the Wall Street Journal reported on the growing practice of U.S. countertrade deals. Here is just one reported example: General Electric agrees to sell $142 million worth of electric turbine generators to Romania (an NME) for use in a nuclear power plant in that country. In return, GE agreed to buy or market overseas Romanian products valued at the full cost of the U.S. generators. As if that were not enough, GE also agreed to export technology that could result in Romania successfully competing with GE in overseas markets.

As a final sweetener, GE assisted Romania in obtaining a $120 million loan from the Export-Import Bank, and is pressing private banks to lend Romania an additional $200 million. The whole point of this illustration is that market disruption caused by U.S. trade with nonmarket economies is far more complex than a simple examination of artificial pricing practices by those countries would reveal. Such lopsided countertrade deals as the one GE has recently made are equally disruptive. These deals are a form of barter that do not fit into the modest protection afforded by existing trade laws and policies which are geared to market economies and a supposed "free trade" philosophy. This is because the foreign countries and companies pressuring for these agreements do not pretend to practice either "free trade" or to follow the underlying principles of a market economy. In this regard, we note that Romania has recently adopted foreign trade legislation that firmly established the principle of "parallel sales," or full countertrade, as part of each contract with a Western company.

The seriousness of these problems was pointed out to this Subcommittee in testimony by AFL-CIO President Lane Kirkland on July 13, 1981:

> "The impact on U.S. trade of barter arrangements can be large. Pricing policies of the firms using barter and/or of a communist country are not based on product cost as in a market system. Countertrade is a serious danger because of the continued transfer of technology and the loss of production and jobs. Yet countertrade may represent 20 percent of world trade in the 1980s.

> "Critical U.S. military technologies have been handed over to nations committed to support the Soviet Union as part of a massive pattern of transferring U.S. technology around the world.
>
> "The AFL-CIO has long urged adequate monitoring of nonmarket trade and bilateral regulation."

Artifical pricing is indigenous to NME's because their prices are government controlled, and their economies are government planned -- heavily subsidized -- and therefore not reflective of an interplay between supply and demand. Production costs are not susceptible to real measurement. Their sales are not based on traditional market factors such as costs and profits. Their aim is to push exports as a source of foreign exchange or barter to aid in internal industrial development or other governmental policies. For these reasons, a "free trade" country ends up playing Russian Roulette when trying to make the price comparisons necessary to establish dumping. The most famous example of this problem, of course, is the Polish golf cart case, in which the Poles, who have no golf courses in their country, were selling golf carts in the United States at exceptionally low prices and disrupting the American market for golf carts. Since there was no internal market for golf carts in Poland, it was impossible to apply the normal test for dumping -- selling below prices charged in the home country -- or below cost of production.

Given the history of trade disruption caused by nonmarket economy countries, the first issue that must be addressed is whether the present law definition of NME's is adequate. We suggest that it is clearly not adequate and recommend that additional language be added to present law so as to include coverage of sales by government controlled and planned economies along with communist countries now covered by definition. In this regard, we do not think it is necessary to scrap the current definition of an NME, as proposed by S. 958, and start from scratch but rather we prefer to build on the current definition to reflect the fact that nonmarket economies are not only communist countries but also include government planned, heavily subsidized economies.

Current law is totally inadequate for taking care of these problems. Both the General Agreement on Tariffs and Trade (GATT) and U.S. law are geared to "free market" economies. In 1978, Treasury Department regulations sought to cope with these problems through the use of concepts of "comparable economy" or "constructed value" (which could include hypothetical costs). At the time, the AFL-CIO urged that those regulations be withdrawn. In a letter of opposition to the Commissioner of Customs (see attached letter dated February 22, 1978), AFL-CIO Research Director, Rudy Oswald, stated in part:

> "Dumping is not a theoretical problem for American workers. It is a hard, unassailable, job destroying fact. Imports of glass, shoes, golf carts, bicycles, have been dumped at the expense of United States workers. Now more sophisticated equipment, such as aircraft engines, computer parts, etc., are coming in from communist countries and costing United States jobs. Any regulation to reduce the penalties for illegal dumping of these products is against the best interests of the United States and a mockery of United States' law."

S. 958 would permit an interested party -- as defined in current law -- to file a complaint alleging artificial pricing against an NME. If the respondent country provides "verifiable information" sufficient to permit a normal countervailing duty or anti-dumping investigation, then the investigation will be conducted without regard to whether an industry is injured or to whether the establishment of an industry is materially retarded. In other words, the current concept of Section 406 of the '74 Trade Act would cease to exist, and instead would be redesigned to deal with unfair trade practices rather than market disruption. The purpose for dangling this carrot in front of an NME is that in the long-term it might encourage it to "develop the attributes of market economies." The other side of the coin -- the stick -- is that if "verifiable information" is not supplied sufficient to conduct such an investigation, then an artificial pricing investigation will commence.

Assuming an artificial pricing investigation, it will be defined to exist "whenever an article like an article produced by such domestic industry, is imported directly or indirectly from an NME country or countries at a price below the lowest free market price of like articles." (Emphasis supplied)

The AFL-CIO opposes this approach because it calls for non-objective bureaucratic determinations. For example, how can there be an objective determination of "verifiable information" obtained from a state-controlled economy under consideration in an adversary proceeding? It would be preferable to retain and effectively enforce market disruption -- the concept embodied in Section 406 -- as determinative. We make this recommendation because it is the sale by the nonmarket country -- not the country standing alone -- that adversely affects U.S. producers and workers.

Moreover, the proposed definition of "artificial pricing" fails to take into account the fact that the United States is disadvantaged uniquely in East-West relations. European countries have bilateral quotas to prevent market disruption -- while the U.S. has remained open to nonmarket countries. The only realistic "free market" measure for a nonmarket import is the average U.S. price for that product. Anything else would encourage imports from nonmarket economies -- to the detriment of U.S. production.

For example, "artificial pricing" should not be determined on the basis that the Taiwanese sell a like article at a price equal to or slightly below that of a nonmarket economy. We suggest that the preferable course of action is to follow the lead of the European countries by preventing market disruption rather than attempting simply to paper over the problem after it has occurred. At the very least, the average U.S. price would be a fairer and more accurate measure.

We would welcome the opportunity to work closely with the members of this Subcommittee in your efforts to find legislative solutions to these complex problems. Certainly S. 958 is serving the purpose of raising general awareness that there is need for prompt action -- we cannot afford to leave unattended market disruptions resulting from unbridled trade with nonmarket countries.

The AFL-CIO, therefore, calls for complete and accurate reporting of all nonmarket trade. The need for an effective and basic test with prompt action is long overdue.

Attachment

February 22, 1978

Mr. Robert E. Chasen
Commissioner of Customs
United States Customs Service
1301 Constitution Avenue
Washington, D.C. 20229

ATTENTION: Regulations and Legal Publications Division

Dear Mr. Chasen:

The AFL-CIO opposes Treasury's proposed changes in the regulations for enforcement of the Antidumping Act against imports of products from Communist countries. These changes, published in the Federal Register on January 9, 1978, would allow Treasury to set lower charges against imports dumped by communist countries in the United States than those now required by law. The AFL-CIO recommends that this unfair proposed change be withdrawn.

Dumping means selling a product in the United States at less than fair value or less than the market price in the exporting country's market. When a United States industry is hurt by dumping of imports, the law directs Treasury to put on a tariff to offset the unfair and illegal dumping price. Dumping is an illegal practice under the United States Antidumping Act of 1921, as amended, and international agreements.

Communist countries have no equivalent of "fair market value" in a market pricing system, because their prices are set by government regulation. To determine dumping values, therefore, the Treasury established a practice of using prices charged for a similar product in a non-communist country where market prices exist. In Section 321 (d) of the Trade Act of 1974, Congress made this practice part of the United States antidumping law. In 1976, Customs amended the regulation, 19 CFR Part 153.7, to conform with that law.

Now Treasury seeks to modify that ruling and allow Treasury officials to construct the appropriate value abroad in one of three ways:

First, actual sales price in a country with "comparable" economic development to the communist country.

AFL-CIO opposes this because no realistic comparisons of economic development levels between market and non-market economies can be objectively established. Furthermore, a product can be dumped in the United States from an underdeveloped country. The level of economic development does not determine whether or not an unfair or illegal price is established.

Second, if no "comparable country" exists which produces the product, Treasury could set up a "constructed value" based on costs of the product in a non-state controlled country. But that value could be "adjusted for differences in economic factors" to meet the "comparable" country standard.

The AFL-CIO opposes this because it would call for non-objective determinations by Treasury. The price in a dumping case is a market price of a product -- not a constructed or theoretical price.

Third, if no "comparable country exists", Treasury can set up hypothetical costs for "constructed value" which then can be adjusted for differences on the basis of "specific objective components" or factors of production. "Such specific components or factors of production, including, but not limited to, hours of labor required, quantities of raw materials employed, and amount of energy consumed, will be obtained from the state controlled economy under consideration." Then the Secretary of the Treasury would be empowered to determine whether or not "verification" of these figures in the "state-controlled economy" meet his "satisfaction", and, if so, these would be "valued in a non-state-controlled economy determined to be comparable in economic development...." (153.7 (b) (2)

The AFL-CIO opposes this because it is non-objective and because it would set up an ever-larger bureaucracy to determine hypothetical information. Again, dumping is sale in a market economy and must relate to real market prices.

Dumping is not a theoretical problem for American workers. It is a hard, unassailable, job destroying fact. Imports of glass, shoes, golf carts, bicycles, have been dumped at the expense of United States workers. Now more sophisticated equipment such as aircraft engines, computer parts, etc., are coming in from communist countries and costing United States jobs. Any regulation to reduce the penalties for illegal dumping of these products is against the best interests of the United States and a mockery of United States' law.

The Treasury Department has not justified any change in the current regulation 153.7 and 153.27 which now conform with United States law. The AFL-CIO urges withdrawal of the proposed changes.

Sincerely,

STATEMENT OF ELIZABETH JAGER, AFL-CIO

Ms. JAGER. I didn't have any additional statement. I did want to comment that while it is not in our statement, I think it is interesting to note that most Western countries do use their own prices or artificial prices. And, therefore, if the United States does not, the pricing system would tend to funnel the goods into the United States as, unfortunately, has happened in other areas where other countries take another route. And since the United States is open, and we are doing what looks to us to be the most realistic thing, we are disadvantaging ourselves even worse.

The other comment that struck me in listening this morning was that a distinction needs to be made between market forces and market economies. There seems to be a belief that if countries like Hungary or Yugoslavia or other countries develop market situations, that they are therefore trending in the direction of the U.S.-type economy. And we would, in fact, be encouraging them to become market economies.

I must say that I haven't found that experience has borne this out. But the point is that all economies, even the nonmarket economies, have market forces in them. The issue before us is the issue of political pricing and unrealistic pricing in this market. And I was disappointed that more attention wasn't paid to the impact in this market, because I think that is the effect that the law is supposedly designed to address.

And the third point I wanted to make was that I find it ironic at this particular moment in history that we should be trying to adjust laws so that dumping and subsidy proceedings would be available to nonmarket economies in a different way, because we are having so much difficulty with the market economies in this area. We are also having difficulty in enforcing codes of conduct. We do not know whether they are going to be effective. We have new law, and we are in a state of not knowing quite where it is going. And I find it unfortunate, in fact, that this law might be extended before we even know the effects of the current codes.

Mr. KOPLAN. There was one additional comment that I would like to add based on listening to this morning's testimony. I noticed that the administration witness, Mr. Olmer, recommended that your bill, Senator Heinz, include or contain an injury test in harmony with current U.S. antidumping and countervailing duty practices while abiding by the requirements of our international obligations.

I was surprised to see that in his testimony because in going back and looking at the 1981 GAO study, I found that there was a letter that he had sent the GAO on May 28, 1981, which in part—I will just read the sentence:

> To unilaterally apply an injury test in cases involving nonmarket signatories of the subsidies code could well complicate our trade relations with market oriented signatory and nonsignatory countries.

And I think the statement that he was making at the time to the GAO—countries that are not signing onto these things, not negotiating, shouldn't be getting the same benefits that others are getting—that made sense at the time last May. And I am surprised to see the change in philosophy on that now.

Senator **Heinz**. Which provision do you agree with?

Mr. **Koplan**. We are not looking for an injury test to be included in your bill

Senator **Danforth**. Senator Heinz.

Senator **Heinz**. Mr. Koplan, you seem to suggest that you prefer the existing section 406 market disruption approach to some of the problems that we have. Do you believe that 406 has worked well to date?

Mr. **Koplan**. No. We are not saying that it has. But if properly enforced, the framework is there. If there was going to be a change, we also made note of the fact that instead of the lowest price anywhere in the free market world, that it is the average U.S. price we should be looking to at the least as an alternative. But, no, we are not saying that 406 has worked well. But we are saying that there is a framework there. And if enforced properly, it could work.

Senator **Heinz**. Well, as you know, this bill, at the same time that it does many other things, does repeal 406 because you have said and everybody else has said it doesn't work. And my question to you is: If it doesn't work and 201 doesn't work why do you support 406 as it stands?

Ms. **Jager**. We support it because we believe that it can work. And we believe that it is unfortunate to scrap existing law and pass a new law which may not work either instead of making a real effort to enforce a law that is there. I am very disturbed at the attempt to move away from the provisions of title IV that recognize that, yes, there is a difference between market and nonmarket economies. There's a very real difference between Communist and non-Communist countries. And I think that the scrapping of 406 would lend unfortunate weight to the view that there simply isn't any difference, that they all ought to be moving in this other direction. And, quite frankly, had it not been for the proliferation of attacks on 406, I suspect that it might have worked. I am always hopeful that there will be a change in the way we look at things. And that we can find out that it might not be bad every time to restrain an import.

Senator **Heinz**. Well, if you have any suggestions on how to make 406 work, I am sure Chairman Danforth and the rest of us would welcome those. But let me ask you and Mr. Koplan the kind of $64,000 question. It's somewhat ironic that the importers from the nonmarket economies are attacking my bill. They have minced no words. The people who compete with them, the manufacturers—the [restaurant] China Council, for example—not from China but those who manufacture china—are supporting my bill. That suggests that my bill must be tougher on the nonmarket economies and because it is tougher on the importers, it suggests that it must give some kind of relief much better than current law. And my question is, which of those two sides do you support? Do you support the importers or our American manufacturers?

Ms. **Jager**. I would like to respond to that, Senator Heinz, because I don't think that the discussions I heard this morning were really very illustrative of what American manufacturers would say about the bill had they heard the point of view that Senator Danforth expressed earlier—in terms of the possibility that it might not go the way these very excellent lawyers suggest that it will. I think that if I listened to Mr. Cunningham and had retained him, that I might be persuaded that this would be an excellent way to handle it, too. But I am not persuaded. And I thought that the explanation that Senator Danforth gave of how it might work would induce some American manufacturers to share our concerns. As for the importers, I didn't hear any importer want to retain 406. Maybe I didn't catch it. I thought that—one of the lawyers did, but I didn't think he was representing importers, I thought he was representing the nonmarket economies.

And I think their experience so far, because it has been handled so politically, would lead them to believe that it should work out that way.

Senator **Heinz**. Well, one of the answers that was supplied to Senator Danforth's hypothetical example was that if the nonmarket economy were selling at a price that was below its cost of dumping—it was dumping, but it was selling at a price that basically was competitive with other hypothetical free market countries such as Japan—that it would be Japan that would be our problem. And that, therefore, while it is an interesting hypothetical problem, in fact, Japan is our problem. And when we have problems of that nature, indeed, they are very hypothetical as in the case of Poland, there is going to be a problem in that area. If that's the case, then the real problem lies elsewhere.

Mr. **Koplan**. I thought, Senator, that the response on that hypothetical was that it wasn't clear as to how it would turn out under the bill, and that it was possible, the way the bill was drafted, that what we might normally consider to be dumping might not be dumping because it's below that lowest price. I didn't think that the witnesses came down positive as to what the result would be.

Senator **Heinz**. Let me just say——

Mr. **Koplan**. Yes.

Senator **Heinz**. As you read the bill, is it your understanding that anybody in this country is precluded from seeking antidumping complaints, procedure and remedy against the hypothetical example, if that is what is going on? I, obviously, wrote the bill, and I did not construct it with that goal in mind. And it is clearly the intent, as stated in remarks that were made here that that is the other remedy if there is a situation where any country is clearly just dumping here.

Mr. **Koplan**. I had not focused on that possibility, but in listening to the back and forth on that issue this morning, I think that it is possible that unfortunate result might be obtained under the bill. I know that is not what you intended.

Senator **Heinz**. Take a careful look at that. It may be possible. I'm not sure it is and I am not sure you will necessarily come to the conclusion you just expressed. You may or you may not. Take a careful look at that.

Ms. **Jager**. Can I make a suggestion in terms of your suggestion that the fault is Japan, that the cause of the problem is Japan. From the standpoint of——

Senator **Heinz**. Hypothetical.

Ms. **Jager**. In the hypothetical, from the standpoint of a U.S. injured party, it relates to the point of having further injury. The small producers or a group of workers has neither the time, the money or the access to information to go from here, to here, to here to prove whether it's Japan or Taiwan or Yugoslavia or the Soviet. In fact, in real life, it is probably all of them who are costing that particular plant and that group of workers their jobs and their production. And it's this problem that I think has to be addressed. That is the reason that the injury test, to us, is so unfair. It is just a terribly unfair test for Americans.

Senator **Heinz**. The traditional way that we have dealt with cases of market disruption is not on a country-by-country basis. We have always dealt with it on an aggregate basis. The escape clause in section 201, I don't believe, as written, that section 201 is totally sufficient. And we will be introducing a series of amendments to 201, which I believe will vastly improve it. You may be familiar with some of that.

I would think that what you said, Ms. Jager, is true. That it is very costly, very difficult for these small firms to do that. It is even more impossible on a country-by-country basis. And what we need to do to answer your specific concern is to look at the overall question of market disruption and how to treat that with an escape clause procedure. Compared to other people's so-called escape clause procedures—incredibly bigger, with lots of hoops to jump through. The Italians have a great escape clause on Japanese automobiles. When the 3,000th automobile comes off the ship, they stop unloading the ship. They don't go to their equivalent of the Italian International Trade Commission and seek determinations. They just do it. I'm not saying we should emulate them. I think there are a number of improvements to be made there.

Mr. **Koplan**. I just wanted to ask two very brief questions in regard to the discussion this morning. One of the suggestions that we made was that the present definition be retained but that we try to develop in addition to that definition of a nonmarket economy is—additional standards. Standards that would bring in, as you all pointed out this morning, those countries that operate the same way and are, in fact, nonmarket countries or have industries that are nonmarket, but might not be Communist controlled. Would you consider trying to add to the existing definition and come up with a standard that would do that?

Senator **Heinz**. Certainly. We are willing. Over the past 2 years, we have tried just about everything we thought we could pick up and if there are more things we should pick up, we can try them too.

Mr. **Koplan**. And then the last question is: Would you rule out the recommendation that at the least, the average U.S. price would be a fair and more accurate measure?

Senator **Heinz**. A parallel approach would be to take an average price of all market producers, an average price, or some other standard which might have the same result. The question that came to my mind was whether that average price of all free market producers would be a better standard to the industry in question.

Ms. **Jager**. I have problems in terms of relative practicality, but also in terms of the interest of U.S. producers, which I think is a terribly important issue here.

Senator **Heinz**. Well I think you sacrifice simplicity and invite complexity.

Ms. **Jager**. And I thought that Mr. Verrill's comments about how difficult it would be to find the average price might indicate how difficult it might be.

Senator **Heinz**. What you suggest is that under certain circumstances it might be very appropriate to do as you suggest. I don't know. I haven't made up my mind in every single instance so I can't answer your question.

Senator **Danforth**. Thank you.

[Whereupon, at 11:45 a.m., the hearing was adjourned.]

[By direction of the chairman the following communications were made a part of the hearing record:]

STATEMENT

by the
American Brush Manufacturers Association
to
U.S. Senate Finance Subcommittee on International Trade
Re: S.958

December 2, 1981

The American Brush Manufacturers Association, 1900 Arch Street, Philadelphia, Pennsylvania, 19103, wishes to comment as follows regarding Bill S.958 by Senator John Heinz (R.,Pa.) to amend the Trade Act of 1974 to provide a special remedy for the artificial pricing of articles produced by nonmarket economy countries.

The ABMA, founded in 1918, consists of 120 brush manufacturing companies and 80 suppliers and equipment and supplies, representing the recognized voice of the American brush manufacturing industry. Members' sales covering all types of brushes and paint rollers comprise an estimated 85% - 90% of total American manufacturing volume. The manufacturer members, called "Active" members, are divided into divisions based on the major types of brushes they produce; paint applicator, personal, household maintenance, artist and industrial.

Following a survey of all members to determine their views on S.958, our Association wishes to go on record in support of passage of this legislation. Basically, this position is based on a perception that artificial pricing of brush products by nonmarket foreign countries represents a real, demonstrable threat to the American manufacturing industry for which no effective remedy exists in present law and regulation.

In the case of paint brushes, particularly those that are now being imported by the People's Republic of China, members inform us that such brushes comprised of natural hog bristle are reaching the retail

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market at prices equivalent to the cost of the hog bristle alone by domestic manufacturing companies. We see this fact as a clear demonstration of what "artificial pricing" signifies. Such selling techniques can only be carried out by nonmarket countries where the motivation is to secure dollar exchange rather than a free enterprise motivation, which basically requires all costs of material, production, distribution and marketing be covered, as well as a reasonable return on investment achieved.

Since Most Favored Nation tariff status was granted to the Republic of China last year, imports of paint brushes have dramatically increased from $70,000 in the first six months of 1980 to $329,000 in the first six months of 1981. Such a dramatic increase comes in the face of declining shipments by the domestic manufacturing industry brought about by slow business conditions in the construction industry and a broadening general recession. Such shipments declined 6.4% in the third quarter of 1981 compared to the second quarter of the year. While shipments for the first nine months increased 8.46% over the first nine months of 1980, this change does not even overcome the general rate of inflation, and therefore represents a reduction in physical volume of brushes shipped.

Paint brush tariffs to most favored nations are now at the level of 7% and an investigation is now underway by the International Trade Commission as to whether they should be eliminated completely for the Republic of China due to their status as a less developed country. Such a change, if adopted, would further increase the capability of artificial pricing techniques to undercut the costs of domestic producers.

Paint brushes are a relatively simple product to produce, the main raw material comprised of hog bristle. In addition to the artificial pricing of the bristle by the Republic of China, referred to above, the very low cost of labor in China serves further to undercut the ability of domestic producers to preserve their market share.

Since the Republic of China does not produce synthetic brush filaments, their ability to penetrate the U.S. market as demonstrated above would be dramatically increased. No doubt in future years we can expect that such products will become available in China. Synthetic filament paint brushes are preferred by the do-it-yourself market, whereas natural hog bristles are preferred by the professional painter.

Members report that the quality of Chinese paint brushes is equivalent to U.S. made products, and are mainly concentrated in the lower to medium price ranges. Handles receive a much better finish in the Chinese brushes due to the low cost of labor that can be committed to their finishing.

We have used the paint brush to illustrate a basic problem that can be clearly measured for a specific product. We believe it demonstrates the basic need for passage of S.958, and urge favorable consideration by the Committee on Finance.

Respectfully submitted,

ROBERT G. CLIFTON

Managing Director,
ABMA

RGC/paf

Council
for a
Competitive
Economy

Sheldon L. Richman
Director of Research

1 December 1981

The Hon. John C. Danforth, Chairman
Subcommittee on International Trade
Committee on Finance
2227 Dirksen Senate Office Building
Washington, DC 20510

Dear Sen. Danforth:

The purpose of S. 958 is to give the government a way to determine when nonmarket societies have "dumped" products in the American market. In the view of the Council for a Competitive Economy, such legislation is not only unnecessary, it is unjust and harmful. "Dumping," as explained in the enclosed Council "Issue Analysis," is a concept that cannot be usefully defined. All it is "good" for is to prevent trade between American consumers and foreign sellers, which means it is no good at all.

The Council steadfastly upholds the rights of consumers to trade with whomever they wish, free from government interference. No one has the right to stop American citizens from seeking the best buy they can find, even from people in nonmarket societies. If this means dealing with foreign sellers who under-price American firms, that is a logical implication of the freedom we pride ourselves on. To praise freedom and free enterprise only until it means a loss of sales for U.S. firms is to gravely compromise one's principles. This is precisely how many business people have worked against free enterprise. Moreover, interference with voluntary exchange wastes resources; that cannot benefit anyone for long.

As to the charges about unfair competition, I refer you and your colleagues to the enclosed paper. I would appreciate your entering this letter and the paper in the official record.

Sincerely,

Sheldon Richman

Enclosures

410 First Street, S.E. Washington, D.C. 20003
(202) 544-3786

ISSUE ANALYSIS

Council for a Competitive Economy • 410 First Street, S.E. • Washington, D.C. 20003 • 544-3786

August 6, 1980

Dumping: The Bogeyman of World Trade

By Sheldon L. Richman
Director of Research

> "If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage. The general industry of the country...will not thereby be diminished...but only left to find out the way in which it can be employed to the greatest advantage."
>
> Adam Smith, The Wealth of Nations

Dumping. The very word sounds obnoxious and aggressive. One dumps garbage or sludge. In discussions of dumping in a world-trade context, it is sometimes hard to remember that the things being dumped are not garbage and sludge but products Americans want: steel, television sets, typewriters, and so on. Nevertheless, producers increasingly complain that foreign rivals are damaging the economy this way.

The case that has received the most publicity is U.S. Steel's dumping-suits against seven European nations. (Others may be filed against Japan and Canada.) U.S. Steel and most of its domestic colleagues believe that European steelmakers are subsidized by their governments, enabling them to sell at an artificially low price in the American market. This, they say, is unfair and should be compensated through government-imposed duties that would force prices of foreign steel up to what domestic firms charge.

Opponents of the suits have responded, in part, that the subsidies to the European steelmakers are small and that the domestic industry's main problem is obsolescence rather

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than unfair competition. In sum, the rebuttal is that there is no "dumping."

While it is true that the subsidies are minimal (however objectionable) and the domestic steel industry (for several reasons) has been a poor competitor, these facts are beside the point. Such arguments imply that were subsidies large and were the domestic industry in good shape, dumping would be worthy of objection and counteraction by the government.

For the purposes of this paper, then, we shall assume that U.S. Steel's charges are true, that foreign steelmakers do collude with their governments and do undersell their American competition. We will demonstrate that even under these circumstances, "dumping" cannot be usefully defined, that it would not constitute "unfair" competition even if it could be, and that complaints against dumping are based on a twisted notion of competition and the market process.

"DUMPING" DEFINED

"Dumping" is usually regarded as the pricing of imports to the American market below "production costs," "fair market value," or home-market prices. Since one or some combination of these is conventionally taken as a valid standard of fair pricing, dumping is alleged to be unfair. But there is more to dumping than this. To really qualify as dumping, the price must be below what domestic firms charge. American firms don't complain when their foreign rivals charge less than these criteria indicate so long as the foreign goods are still priced above American goods. So apparently the real offense of foreign firms is that their products sell for less, whatever the reason!

But there's an inconsistency here: If subsidized foreign firms harm a domestic industry when they underprice, don't they also harm it when they charge the same as domestic firms? After all, without the subsidy, they might have had to charge more than American firms. Moreover, subsidized foreign firms charging more than their American competition could be accused of harming the American industry, since without the subsidy, presumably they would have to charge even more! The upshot is that by protectionist logic any price charged by a subsidized importer is unfair, and the only remedy is exclusion.

The flawed premise in the dumping concept is that fairness in pricing lies in pegging prices to costs, fair-market value or home-market prices. Why are these criteria of fairness? They were never the criteria of free traders historically. Fairness in trade can mean only one thing:

voluntary consent of buyers and sellers. It has nothing to do with relations among competing sellers. (If a businessman blows up his competitor's plant, we don't say he competed unfairly; we say he committed a crime.)

Examination of the three criteria shows that they cannot be guides to fair pricing. Since costs are opportunities foregone, their magnitudes are subjective, unmeasurable and, hence, unsuitable for judging prices. It is bad economics to look at money outlays in determining real costs. The cost of any action is the most attractive alternative passed up at the time of the decision. Once a decision is made, the costs are ephemeral bygones.

A firm decides to sell its products at a given price because it expects this option to yield greater benefits than any alternative. But if that's so, abstaining from the sale or charging a higher price must entail lesser benefits, that is, greater costs, in the seller's judgement. This is true even if the price is below outlays for production. Past costs of production are irrevocable and can exercise no influence on prices. (Future costs are unknown.) The upshot is that unless the price is expected (by the seller) to rise later or unless he can consume the product himself to greater advantage, the sale is costless. It follows, then, that the price in any voluntary sale is necessarily above "costs" or the sale would not have occurred. By this definition, dumping is impossible.

The fair-market standard makes even less sense. There is no fair-market value apart from the real market activities of real people. If a price is accepted in the market, it necessarily accords with the someone's valuation of the product. Prices below fair-market value in this sense are impossible.

As for different prices in different locations, while the market tends toward uniform prices of comparable products, differences can occur for various reaons. What's important here is that as long as both prices are voluntarily agreed to, nothing about them is unfair. If we grant, for argument's sake, that different prices are evidence of unfairness, we could as easily conclude that the higher price, not the lower one, is unfair. But that conclusion is never drawn by those who complain about dumping.

We must conclude, then, that dumping is nothing more than the pricing of imports below domestic products.

COMPETITION MISCONSTRUED

Dismissing dumping as a useful concept, however, will satisfy neither the domestic firms nor their modern mercantilist mentors, who are likely to respond that their real concern is that foreign firms don't operate under the same conditions as American firms. Foreign firms pay lower taxes, perhaps; their labor costs are lower; unions are weaker and so on. It is too easy at this point to go for the reductio ad absurdum. Imagine a domestic winemaker asking for antidumping duties against a foreign firm because the foreign country has a longer summer, giving it an advantage in grape-growing. (Frederic Bastiat imagined something similar in 1850. See his "Candlemakers' Petition" in the June issue of the Council's newsletter, *COMPETITION*.) Or imagine an American producer of kangaroo meat asking for duties on his Australian competitors because kangaroos are native to Australia. In both cases, conditions are unequal. But conditions are always unequal. No two positions on earth are identical. No two competitors have the same employees working for them, or the same machines. If identical conditions are what determine fair competition, *all competition is unfair*, even that among domestic firms. (Why don't firms in Minnesota, say, accuse firms in Texas of dumping since weather and labor conditions are unequal?)

At root is a fallacious notion of competition. The word has two distinct senses, and the confusion between them leads to misunderstanding and bad policy. The gaming sense of competition is different from, though similar to, the economic sense. In games, competition is an end in itself. One plays the game to play the game. The competitor can have other purposes, but the game is fundamentally an end in itself. Further, the objective of the game has no meaning outside of the rules. Getting to home plate, for example, has no significance apart from the rules of baseball.

Economic competition is different. It is not primarily an end in itself. It is a by-product of the activities of sellers and the freedom of consumers to choose among them. Unlike in games, the ends of economic competition--the well-being of consumers and producers--are significant apart from any rules. In the economic system, the ends define the rules; in games, the rules define the ends. Consumers and producers decide how best to serve their well-being, then they pursue it. The rules we acknowledge--the rights of their fellows, etc.--follow from the ends. In contrast, the objective of games is to follow the rules competently. The end cannot be pursued independently of the game or the rules; in fact, to attempt such is to change the game. ("Tennis," wherein players could catch the ball before hitting it back across the net, would *not* be tennis.)

The significance of this is that while "equal conditions" in games is a matter of fairness among players, it has nothing to do with fairness in economic competition. If one card player can read the back of the cards, that is indeed unfair competition. But if one firm undersells another because its taxes are lower, nothing unfair has occurred between them. It hasn't violated any "rules" of competition; it certainly hasn't violated the rights of competitors.

What gives some plausibility to the case against dumping is that when foreign governments subsidize their industries, they do so at the expense of their citizens. If Japanese steel firms get political favors, Japanese citizens are forced to pay. This violates their rights. The unfairness, however, is confined to them.

Perhaps without subsidies to foreign firms, American firms would do better. This is by no means self-evident. The regulations attendant with subsidies may do more harm than the subsidies do good. It is plausible that foreign firms would compete more vigorously if their governments adopt a laissez faire policy.

Critics of dumping, it should be pointed out, do not mean to garner sympathy for the Japanese taxpayers; they appear quite willing to see American taxpayers similarly harnessed to "promote exports" or to shelter "mature industries." Further, some of the measures regarded as subsidies are nothing of the kind. Lower taxes, tax credits and refunds, faster depreciation--none of these are subsidies because they constitute a lessening of government power, allowing producers to keep their own property. A subsidy is the reverse, an exercise of government power to redistribute property from the taxpayers to someone else.

To the extent that foreign governments force their citizens to subsidize industry, the free market is hampered We hope those citizens put a stop to it for their own sakes. But the U.S. government can and should do nothing to right that injustice. Anything it does only compounds the injustice. Preventing American citizens from paying the lowest prices they can get would be a bizarre act of justice indeed.

AT THE "MERCY" OF TRADE

The foregoing will leave many people concerned that unbridled world competition might ruin American industries and create permanent unemployment. Industry and union leaders have united on this point. What does the case for free trade have to say about it?

First, we can't say with certainty what will happen to any American industry or firm in the face of competition. Only the market can tell. But let's imagine the worst case, that foreign competition is able to make the American steel industry unprofitable, and so it shuts down. What then? In 1881, William Graham Sumner considered the same question regarding America's shipping industry, which continues to be heavily subsidized. He wrote:

> The only question which is of importance is this: are the people of the United States better employed now than they would be engaged in owning and sailing ships? If they were under no restraints or interferences, that question also would answer itself. If Americans owned no ships and sailed no ships, but hired the people of other countries to do their ocean transportation for them, it would simply prove that Americans had some better employment for their capital and labor. They would get transportation as cheaply as possible. That is all they care for, and it would be as foolish for any nation to insist on doing its own ocean transportation, devoting to this use capital and labor which might be otherwise more profitably employed, as it would be for a merchant to insist on doing his own carting, when some person engaged in carting offered him a contract on more advantageous terms than those on which he could do the work. ("Shall Americans Own Ships?" The Forgotten Man and Other Essays.)

In other words, no great tragedy would befall the American people if any particular industry doesn't exist here. This situation would arise only were it more advantageous to buy the product abroad and devote the American resources to better projects. "Workers who produce products that are sold to Japan to earn yen used to buy Japanese steel are producing steel for the U.S. just as much as the men who tend to the open-hearth funaces in Gary," writes Milton Friedman.

But don't we deny ourselves a reliable supply of steel if we become dependent on foreign producers? Not at all. They don't sell us steel as a favor; they depend on the trade for goods they can't produce themselves. The Japanese export so much because they have to import so much.

Besides this, there is no steel monopolist among foreign nations; competition precludes American dependence on any one firm. Potential supply interruptions can and will be planned for by that critical function of the free economy: speculation. Entrepreneurs sensing a future interruption will buy up steel and hold it in anticipation of increased scarcity.

So foreign trade, even in the extreme case we've considered, does not put the American people "at the mercy" of foreign producers. It does, however, make our populations interdependent, as trade always does. Few of us could live self-sufficiently. The benefits of trade and the division of labor are incalculable; life itself depends on it. We should welcome it, realizing that peace is the greatest dividend. People who profit from an intricate network of worldwide exchanges are less likely to go to war; they have too much to lose. (For proof that OPEC is not an example of subordination to foreign trade, see Council's Issue Analysis "The Energy Shortage: Planned Chaos.")

UNEMPLOYMENT

There still is the fear of unemployment to be considered. In our worst-case scenario, won't steelworkers and others lose their jobs? Yes, but that is not the same thing as permanent unemployment. People are constantly losing jobs and capital as a result of changes in the economy. Everyone knows of that possibility when he takes a job or makes an investment. What counts is that as long as human wants are unlimited, labor and capital will be in demand. We don't need to make work; there will never be enough workers and capital to produce all the things we would like. If there's no steel industry in the United States, the steelworkers will produce something else.

If our present high unemployment and general economic condition seem to refute this, look again. We don't have unemployment and idle capacity because consumers are already fully satisfied. We have these because government intervention in the economy has induced malinvestments (through inflation) and hampered the re-channeling of labor and capital to better ventures (specifically, with wage rates made rigid by labor legislation, the corporate-income and capital-gains taxes and other measures). In general, government interference has ossified the economic system, hardening the arteries of the marketplace and placing our prosperity and liberty in grave jeopardy.

The absurdity of the conventional view of employment can be seen in a story told by Frederic Bastiat in the 19th century. He imagined that Robinson Crusoe decides to make a wooden plank so he can more easily carry things from one level to another. As he sets to work, Friday notices that a plank of perfectly suitable dimensions has washed up on shore. When he offers to fetch it, Crusoe says, "No, Friday. You will cause me great hardship if you bring me the plank. I estimate that it will take me three hours to build one. In turn, it will create an additional hour of work because I will have to re-sharpen my tools. That is four hours of unemployment that you cause by fetching the free plank."

Crusoe's foolishness is obvious. The "dumped" plank frees four hours for things (work, leisure) he wouldn't have had otherwise. Serendipity provided the plank plus things he couldn't afford before.

We work so that we may consume, not vice versa. Deliberately choosing the most costly way to achieve something doesn't enrich, but impoverishes, us. Costs are opportunities foregone. The lower the costs, the more opportunities we can take advantage of.

CONCLUSION

There is no conflict between what is just and what is productive. The market's virtue lies in promoting the well-being of all by leaving each participant free to pursue his personal well-being. Trade benefits each party or it does not occur. This is true even if trade transcends political boundaries. Government effort to direct the market, even when motivated by actual hardship, only spreads and intensifies the hardship, leaving everyone (excluding the bureaucrats and privileged interests) worse off.

Statement of
Peter D. Ehrenhaft
Submitted on behalf of Polish State Enterprises
owning importers of products from the
Polish People's Republic
in connection with S. 958,
97th Cong., 1st Sess. (1981)
Before the Subcommittee on Trade
of the Senate Finance Committee
January 29, 1982

I am Peter Ehrenhaft, a partner in the Washington office of Hughes Hubbard & Reed. As Senator Heinz has noted in his remarks in introducing S. 958, I was the Deputy Assistant Secretary of the Treasury responsible for the administration of the antidumping and countervailing duty laws from 1977 to 1979, until -- as it is sometimes said -- this Committee suggested that I be reorganized out of my job! In any event, from that vantage point, I gained an intimate knowledge of the problems the bill seeks to address and which this Committee is now considering.

Since returning to private practice about two years ago, I have had the privilege of counseling certain importers of Polish merchandise, in particular, Polfoods, Inc. in New York City. That firm imports hams, among other food items, from Poland. It is on behalf of Polfoods and other Polish importers that I am presenting this statement. I have also continued my interest in this subject on a more academic front: I teach a course in trade policy at the University of Pennsylvania Law School together with my former colleague at the Treasury, Bob Mundheim, and I write and speak on the subject.

First, I want to express support for some of the concepts underlying Senator Heinz' bill. We agree that it is appropriate to "depoliticize" U.S. trade law and to deal with imports of all countries on an evenhanded basis. We applaud the proposed elimination of Section 406 of the Trade Act. We welcome the effort to simplify and make more workable the rules concerning the application of the antidumping laws to imports from economies existing laws call "state-controlled."

Second, I must deplore the notion in this bill that that the United States might deny to certain of its trading partners -- even members of GATT and signatories of the Antidumping Code -- the opportunity to demonstrate their exports are not causing injury to U.S. industries before antidumping duties are imposed. As we understand the proposed statute, it would enable the Secretary of Commerce easily to apply penal duties to imports from a country such as Poland without any injury determination. Even Section 406 bowed to the international obligations of this country by including an injury test. We could not support repeal of Section 406 at the price of foregoing an injury standard in a new law.

Third, we would urge this Committee to consider favorably the recommendations made last September by the General Accounting Office[*] in its report on the trade laws affecting imports from non-market economies. S. 958 does build on one of the two tests the GAO recommended; but we suggest strongly that the other test be included as well.

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[*] GAO, "U.S. Laws and Regulations Applicable to Imports from Non-Market Economies Could be Improved," Report ID-81-35 (Sept. 3, 1981).

Finally, I will suggest that the countervailing duty law be amended in the manner contemplated by the MTN Subsidies Code, namely, that the subsidy effects on products from state-controlled economies be measured by the techniques applied in calculating dumping margins -- in accordance with dumping rules the GAO has recommended.

I. The trade laws should deal with imports from all countries on an evenhanded basis and on economic, rather than political, grounds.

In his remarks introducing S. 958, Senator Heinz noted that "most observers have made a convincing case that [U.S. trade] legislation should, where possible, treat non-market economies like anyone else." His bill is built, in part, on this principle. Such a policy of evenhanded and non-discriminatory law would promote trade, serve the cause of peace and set a good example in a world too ready to draw lines between "good guys" and "others."

The Polish importers I represent very much welcome this initiative. But Chairman Danforth, in calling this hearing, has sensibly asked whether trade with non-market economies can be conducted on principles like those applied to our traditional trading partners. And, he asked, how are "state-controlled economies" to be identified, as such, assuming some special treatment were regarded as necessary or desirable?

We believe trade can be conducted between Poland and the United States on an apolitical basis, and that sensible -- albeit occasionally "special" -- rules may and can be applied to facilitate the process, recognizing the differences between the two countries' economic systems.

A. Special rules may be needed before applying the antidumping and countervailing duty laws to imports from state-controlled economies.

To the extent the antidumping law, in particular, is based on notions of discriminatory pricing between home and export markets, some separate procedure for applying that law to products from non-market economies is probably necessary due to difficulties in finding a common denominator for comparing the prices in the two economies. Moreover, as the antidumping law is now seen as even more significantly a measure directed against sales below cost than against sales at different prices, if the costs of a producer in a non-market economy are expressed in terms of a currency that it is difficult to convert to dollars, some special rules may be needed to enable the Administrator to make alternative measurements of that producer's "costs."

The countervailing duty law seems ill-fitted to any imports from a non-market economy in which, to some degree, all production is state directed and, thus, might be regarded as "subsidized." As is discussed in greater detail below, this statute should not apply directly to exports from "state-controlled economies."

B. But Section 406 should be repealed.

No persuasive case has been made that a special law is needed to deal with so-called "market disruption" from "Communist countries" (identified for such treatment in Section 406) much less from state-controlled economies more generally.

Section 406 is based on politics, not on economics. If it is general U.S. policy to foster trade with the state-controlled economies, including the so-called "Communist" countries, their exports to this country should not be singled out for the particularly onerous treatment provided by Section 406. Fortunately, from the point of view of Polish exporters, this section has been infrequently invoked. In the single case in which Polish goods were affected, the ITC found 5-1 that no "market disruption" within the meaning of the law occurred. But the case of Anhydrous Ammonia from the USSR illustrates the strange ways in which this section of the law can be applied and -- most importantly -- how disruptive such political invocation of the legal principles can be to long-term trade relations. It is particularly a problem when applied, as it was in that case, to counter trade transactions that are of such importance to Poland and many of the other "state-controlled economies." By its extension of Executive discretion in the face of an ITC finding, it is contrary to the sensible congressional efforts this Committee pioneered to adopt more predictable, judicialized import procedures, such as those mandated by the Trade Agreements Act of 1979.

Its loose terms and uncertain effects sit as an unsettling cloud on the trade horizon. We can't be sure if and when it may break and start to rain. As Senator Heinz has eloquently made the case for the adequacy of Section 201 (and he might add Section 301) for dealing with rapid surges of imports from any country -- a phenomenon, it might be added that has rarely, if ever, been observed as occurring with respect to imports from state-controlled economies -- I will only add "Amen."[*/]

C. The new approach to imports from "state-controlled economies" ought to apply to additional exporters.

The GAO Report criticized the Commerce Department for its failure to indicate the bases on which it determines that particular exporting countries are "state-controlled." It suggested three tests of its own: the existence of central planning of the entire economy; the administrative establishment of domestic (and presumably, export) prices; and the non-convertibility of the currency. These three tests seem proper. But if they were rigorously and evenhandedly applied to exports from all of the trading partners of the United States, the result would be that many countries in addition to the members of the CMEA and the PRC would be regarded as "state-controlled." Indeed, it might well be that but for the

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[*/] Section 232 of the Trade Expansion Act of 1962 would also appear to be adequate for dealing with "national security" cases involving trade from state-controlled economies. At least no case has been made that that section of the law requires revision.

members of the OECD (and a few others), all of the other countries of the world are more or less "state-controlled." And even some of the OECD participants might be so regarded.

On the other hand, the tests articulated by the Commerce Department as decisive in its recent determination that Hungary is "state-controlled" within the meaning of the antidumping law are not persuasive.[*] Commerce said Hungary was "state-controlled" because

- excess wages paid to factory workers are subject to a progressive income tax at up to confiscatory 100% rates;
- capital is available to productive enterprises solely from internal sources or state-controlled banks;
- the currency is non-convertible;
- the government has the power to appoint managers of enterprises.

Other than the factor of currency non-convertibility, the criteria cited might easily apply to state-owned companies in the U.K. or France. And recent controls on capital movements in the latter country might be cited to suggest that France is a state-controlled economy under those tests.

Clearly that is not the intent of the law or a reasonable interpretation of its requirements. Senator Heinz' bill seeks to avoid the political labels and to test exporting countries by economic criteria. Those which the GAO has proposed are workable and adequate. They should be enacted into the statute and not left to agency discretion, lest the results be those observed in the Axles case, sending confusing, if not essentially meaningless, signals to the world trading community. If incorporated into the law, the Secretary might then be encouraged to publish periodically the countries that presumptively will be treated as "state-controlled," leaving to the parties the option of proving otherwise within the readily recognized criteria of the law. If they were applied, it may well be that the Polish economy will, in the light of these tests, at some time no longer be regarded as "state-controlled." This would provide appropriate recognition to its status as a long-standing and reliable trading partner of the United States.

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[*] 46 Fed. Reg. 46152 (Sept. 17, 1981).

II. The trade laws should not deny to members of GATT, much less to signatories of the Antidumping Code, the benefits of an injury test in applying what is in theory and fact an "antidumping duty."

While my clients welcome many of the concepts of S. 958, they must deplore one aspect of the bill that could seriously disrupt trade from state-controlled exporters. Proposed Section 406(c)(2) appears to violate the international obligations of the United States to its trading partners in the GATT and, more particularly, to those who have signed the Antidumping Code. It would also be ironic and, I suggest, short-sighted, for the United States, as the principal spokesman for a rule of law in international trade matters, and the leader in seeking adoption and meticulous adherence to the Codes that emerged from the MTN, now to turn its back on the international rules it worked so hard to create.

Strong statements? Not too strong in the face of the proposed measure, by which the Secretary of Commerce could determine that insufficient verifiable information had been provided by an exporter from a state-controlled economy to permit the investigation to be conducted as an antidumping case. The consequence is allowing him to impose what amounts to an antidumping duty without referring the matter to the ITC for an injury determination. While dressed in the coat of an "artificial pricing duty," this action would be but a rose by another name, still smelling the same as any garden variety antidumping duty. It is noteworthy, in this regard, that even when it enacted Section 406, to deal with "market disruptions" from "Communist countries," Congress felt it necessary and appropriate that an injury test be included. In fact, the existing standard of Section 406 may even be higher than the one mandated by the MTN Subsidies and Antidumping Codes if not GATT itself. Congress cannot now retreat on this point and eliminate the injury rule. Finally, it should be added that aside from its disregard of our country's international obligations, elimination of the injury test would constitute an invitation to apply political pressure on the Administering Authority to regard as "inadequate" whatever data a so-called state-controlled economy exporter may furnish. It would thus generate efforts directly contrary to the manner in which Congress in its most recent trade legislation of 1979 sought to bring principled decisionmaking to trade questions.

III. The GAO Report proposes sensible amendments to the antidumping law preferable to those in the bill.

It is not unfair to suggest that imports from Poland provided the catalyst for the bill we are considering today. Those familiar with the problems Senator Heinz has sought to address know that golf carts produced by a Polish aircraft manufacturer for the U.S. market provided the quintessential "problem" case under our antidumping law. The product was made and shipped by an enterprise whose sole commercial market was the United States. As has been aptly stated elsewhere, "the Poles put the cart before the course": there being no golf courses in Poland, there were also no sales of the product in the home market. And, indeed, there were no real sales elsewhere, as sportsmen in other lands apparently regard their hikes through the links an important part of the game!

But although much fun has been poked at this Polish story, the Golf Cart case demonstrated convincingly that the antidumping law and the Treasury Department's handling of the problem before 1977 was, at the very least, not well considered. At that time, efforts were made to obtain the "fair value" of the golf carts from the prices at which an obscure Canadian producer sold a small quantity of carts. The results were unsatisfying to every participant in the case. And when that producer went out of the business of making what Treasury had considered was as at least roughly comparable foreign-made merchandise, it was necessary to consider a new approach.

It was at that juncture that I arrived at the Treasury and ultimately came to be the beneficiary of the advice Senator Heinz mentioned in his introductory comments. In 1978 we convened "Interface I," bringing together representatives of industry and government -- domestic and foreign -- as well as a number of outstanding academics. A talk I gave at a luncheon during that meeting may still be of interest (and I am, therefore, attaching a copy). It spelled out the criteria we thought ought to be applied in developing a set of rules for the administration of the law with respect to products such as those coming from Poland. In essence, we said the rules had to be

- fair, and not discriminate against the so-called "state-controlled economies" because of their political systems;
- consistent with existing principles of the antidumping law; and
- perhaps, most crucial, "administrable" by government officials (and, of course, the parties concerned).

At Interface I we proposed, and Treasury ultimately adopted, a rule that the GAO, in its recent report, has also suggested meets these tests. In essence, it allows a producer in a state-controlled economy to utilize its own factors of production and to value them in a "free market" of comparable economic development to develop a "constructed value," as that term is generally understood under the antidumping law. However, unfortunately, at that time, Treasury was unwilling to go as far as most of the conferees had suggested. The rule in final form -- and the one the Commerce Department still applies -- allows this constructed value approach to be used _only_ if more "traditional" techniques in calculating fair value, albeit through surrogates in market economies of comparable development, are inadequate or unsuitable.

The result has been that in all of the cases decided in the initial stages (i.e., not under section 751 of the new law), the prices and costs of _third_ companies, in countries other than those in which the goods were produced, were used to establish the "fair value" of the merchandise under investigation. In _Steel from Poland_, a Spanish producer's prices in the home market were used; in _Menthol from the PRC_, Paraguayan export prices to the U.S. served as surrogates; in the recent _Truck Axles from Hungary_, an Italian company's home market sales are the reference.

In my judgment, this is not sensible policy. It flies in the face of legislation enacted as a part of the Trade Act of 1974 with respect to antidumping investigations concerning merchandise from other than the so-called state-controlled economies. Then, Congress specifically _rejected_ as appropriate the utilization of third party prices and costs for establishing the "fair value" of a particular respondent's merchandise. It recognized the inability of such a respondent to exercise any control over the prices and costs of the third party being used. Congress did not want to deny to the very respondent in a case the ability to assure itself that it is not dumping (unless it retreats from the market entirely -- which it surely is not the aim of the law to achieve). And yet that is the result of the "third party price or cost" rule.

Not only is the application of third party pricing or costs to a respondent unfair to the exporter from the state-controlled economy (and thus violative of what I think is the first principle that ought to apply), it is also in many cases absurdly difficult to implement by the government. The GAO Report amply documents this fact. I can also attest to it from personal experience: When I was at Treasury we sought the prices of the U.S. manufacturers of golf carts -- presumably the parties with the greatest interest in furnishing that data and most familiar with the reasons why it was needed and how it would be safeguarded and used. But even they were reluctant to give the government those facts. How much harder and more frustrating it is to search around the world for surrogate producers in other countries to supply facts about their sales and costs for a proceeding in which they have no direct involvement or even interest. The use of third party prices and costs is, therefore, not administrable. It ought to be scrapped.

If it were scrapped in favor of the simulated constructed value approach that Interface I proposed and that the GAO Report endorses, is that a rule that meets the principles I mentioned earlier? I suggest it does. It fairly allows a particular producer to attempt to demonstrate that its prices are not below its costs, and thereby gives that party some ability to control its market behavior. It also allows the producer from the state-controlled economy to try and show that it has a comparative advantage in making and selling the goods or services in question. Verification of input factors is no more difficult than the verification of other information routinely reviewed by Commerce or Customs officials in antidumping and other cases. And "pricing" these factors in a surrogate economy is not necessarily a difficult task -- particularly if the burden is placed on the respondent to demonstrate a technique and selection process as the Polish producer of golf carts was well able to do.

If it is a sensible rule, why is it not being adopted? Criticism has focused, first, on the notion that a market economy of "comparable economic development" can be found in which the pricing aspect of the exercise is "reliable." I suggest this criticism misses the point. It is not necessary that the Administering Authority be satisfied that every criterion of "market development" be identical or even similar for the purpose in question. A rough comparability, to which most responsible economists would agree, is sufficient and, indeed, exists. The countries of Eastern Europe are, in many ways, at a stage of economic development not dissimilar to some of the market economies of the Mediterranean basin: Greece, Spain, Portugal. Comparisons of the costs of labor and energy and capital in those lands provides an adequate guide to "free world" costs of those same factors in Poland or Hungary. Moreover, to the extent that, as the GAO Report indicates, some of the inputs a particular state-controlled enterprise buys are obtained on world markets in convertible currency, there is no reason not to price those inputs at their actual prices. And as the economies of some of these countries move toward a "reform model," with less rigid central planning and even more freely convertible currencies, it may even be possible to use all of the internal prices and costs of those producers.

That is not to say that there are no difficult cases in which the rule might be hard to apply. With respect to the PRC, for example, I was one of those somewhat astonished to find the Commerce Department selecting as the surrogate for the most populous state-controlled economy in the world, what might aptly be termed a family-controlled principality in Latin America. Finding suitable economies with which to compare the Soviet Union or China is hard. But it is not impossible, and certainly ought not for that reason to be rejected with respect to the many more numerous situations in which we are dealing with merchandise from countries for whom surrogates can be found with relative ease.

Criticism of the rule has also focused on the alleged difficulty petitioners would have in stating an adequate case of dumping if they were compelled to develop the imagined costs of an Eastern European producer and then to "price" those costs in some undetermined third country. In fact, I suggest that the petitioner has, in some respects, an easier time in attempting to establish sales at less than fair value in such cases than in situations in which he must seek price data on foreign home market transactions. A projection of his own costs and factor inputs, suitably adjusted for the foreign locale from published information, is precisely what the existing Commerce Department regulation (19 CFR § 353.36(a)(7)) contemplates for such cases. It ought not to be more difficult to apply in the case of Polish wares than in the case of Swiss or French merchandise.

A third criticism of the rule stems from fears that the records of producers in state-controlled economies will either be unavailable for inspection by U.S. Government verifiers or will be unreliable even if examined. To the extent a producer (or its government) declines to permit access, the law and regulations have an ample answer: the "best evidence rule." The situation is no different than any other in which cooperation from respondents is not forthcoming. With respect to reliability, one must await actual experience. However, it can be said that in the two cases in which the input records of the state-controlled economy producers were meticulously reviewed by Treasury and Commerce personnel -- *Golf Carts from Poland* and *Montan Wax from the German Democratic Republic* -- the records were found to be more than adequate.

A fourth objection suggests that since the state-controlled economy may attempt to foster one type of production rather than another, it may "unfairly" be able to demonstrate real comparative advantage in the favored industry. But why is this unfair? Our entire trading system is supposed to be based on comparative advantage. We should encourage it. It is sensible for the Hondurans to grow bananas, just as it is unreasonable for Icelanders to try to do so. Similarly, if Poland has coal resources, it *should* mine and export coal. If Hungary has a technological base in electric light bulb manufacture, it should exploit that advantage. Only to the extent that the Hungarian producers are, in effect, growing bananas on the ice cap in a hot house subsidized by the government should we complain. But then there is ample scope in the administration of our existing law (even without the use of the countervailing duties law) to find margins of dumping, since obviously, their labor or material costs will be excessive. If, however they do have a comparative advantage, why should American consumers be denied the ability to buy their goods? If there is any "unfairness" it is to our own people.

This latter criticism of the constructed value rule assumes that export industries in state-controlled economies are often "targeted" for stimulus and support. Senator Heinz has suggested this is a fact. Of course, to some extent all economies -- including our own -- that buy at least some goods abroad, must export in order to earn the funds with which to buy what they need. And all of us are encouraging exports to some degree. But it is very hard to prove (rather than conjecture) that the economies of scarcity that characterize most of the countries we call "state-controlled economies," are particularly or effectively pushing their export industries in other than those fields in which they do have some comparative advantages. The Polish producers of hams, for example, whom I represent, have been shipping their products to this country in volume since before World War II. It was as sensible an economic judgment that this was a good market for their products in 1930 as it is in 1980. Golf carts were made specifically for this market -- just as there is specific merchandise made here for unique foreign markets. But those carts were (and are) made in a factory that, apparently, can stamp, paint and assemble the sheet metal involved with relatively low inputs of material, labor and energy. That is not "unfair" or "artificial" pricing.

Finally, the rule is criticized as too hard to administer. There may be situations in which the search for input factors becomes too difficult or in which the foreign producer or its government declines to provide the timely access needed by our administrators. But, if so, the other prong of the GAO recommendation also makes sense to my clients. That rule suggests finding for "fair value" the average price of the lowest cost free market supplier to the U.S. market, whether foreign or domestic. Clearly, if ascertainable, that price would be a convenient bench mark for exporters in, say, Poland, to follow. That is the standard this bill also proposes -- but exclusively. We support its adoption, as long as the exporter has the option to try and prove a lower "simulated constructed value." Unfortunately, I do not have much confidence that it will be easy to find the lowest average price, and that is why I find the proposed legislation troubling in its exclusive reliance on this principle.

To the extent that merchandise is truly fungible -- the way bulk chemicals or other commodities may be -- the rule may well be workable. But even with respect to such goods, there are differences in grade, packing, terms of delivery, length of contract and the like that may make direct price comparisons with imported merchandise difficult -- at least without making a number of what inevitably become arbitrary adjustments. But as one deals with more fabricated and differentiated merchandise, the notion that one can find the "lowest average price" in the U.S. market becomes virtually impossible. One might find ranges of prices describing classes of roughly similar goods. But even with respect to a canned ham, there are differences in quality -- of water content, of fat, of the "taste" based on the solution in which it was cured or the food eaten by the swine from which it was made -- that affect price. And with manufactured items there are often non-functional differences in appearance and style, in warranty and after-sale service terms, in delivery times and spare part availability, just to name a few, that makes the contemplated "to-the-penny" comparisons untenable.

There is also a small question of fairness. The rule allowing exporters from state-controlled economies to use the lowest U.S. price may be seen as giving those producers an unfair advantage that sellers in free market economies lack. But I do not find the rule objectionable on that basis. It rests on notions this Committee has, in connection with the antidumping amendments in the Trade Act of 1974, recognized as proper. It is based on the view that foreign merchandise priced above goods available in this market that are not being dumped or subsidized cannot, as a rule, be seen as a cause of injury to the U.S. industry. Nevertheless, it might be appropriate for this Committee to consider amending the statute generally so as expressly to permit exporters from all countries to demonstrate that they are not dumping within the meaning of the law by submitting proof that reasonable quantities of such or similar merchandise are available on the U.S. market at even lower prices.

In conclusion, it is our view that the GAO has proposed a sensible rule for dealing with dumping from state-controlled economies and it would be our recommendation that its position be adopted in lieu of the approach taken by the bill.

IV. The countervailing duty law should be amended to include the concepts of Article 15 of the MTN Subsidies Code.

The GAO Report adequately points out the problem with the existing countervailing duty law with respect to imports from state-controlled economies. No reliable method of calculating the "subsidy effects" of a totally planned economy exists.

Under these circumstances, it would seem sensible that the countervailing duty law recognize the use of the antidumping methodology for establishing the equivalent of "subsidies."

There is a further reason for this approach. Under the Trade Agreements Act of 1979, only countries that have signed the Code or assumed equivalent obligations are entitled to the "injury test" of the countervailing duty law. For a variety of reasons, not the least of which might be the inability of a "state-controlled economy" to identify what is properly regarded in its economic system as a "subsidy," such countries may be unable to sign the Code in good faith. While the assumption of "equivalent obligations" to those accepted by signatories could, perhaps, be negotiated on a bilateral basis with the United States, a more general principle applicable to all such countries trading with the U.S. would seem to be a better solution. That principle would build on the existing terms of the Subsidies Code and immediately shift any countervailing duty case brought with respect to merchandise from such countries into the antidumping mode for consideration -- including the injury test.

V. Conclusion.

We very much appreciate this opportunity to bring our views to the attention of the Committee. The problems you are considering are difficult conceptually -- and politically. Fortunately, much effort and thought has been brought to bear on the issues by the participants in the three Interface conferences, as well as by others interested in the subject. The consensus emerging seems well-summarized by the report of the General Accounting Office. We urge its reasonable proposals -- as amplified by these comments -- receive your most serious consideration.

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February 1, 1982

Robert E. Lighthizer, Chief Counsel
Committee on Finance
Room 2227
Dirksen Senate Office Building
Washington, D.C. 20510

Re: S. 958 (To provide a special remedy for the artifical pricing of articles produced by nonmarket economy countries)

Dear Sir:

We are pleased to have the opportunity to present the views of the American Association of Exporters and Importers ("AAEI") on the captioned bill being considered by your subcommittee. We have a number of objections to the bill as presently written, and we hope the bill can be rewritten to incorporate our suggestions

We welcome and support the goal stated by Senator Heinz, the sponsor of this bill, to "renew the debate in Congress and in the trade community in general on how our government can best deal with this difficult problem in a way which is fair both to foreign governments and their exporters and to our own industries". The AAEI also hopes that the solution to this difficult problem will be fair to the American consuming public, as well. Unfortunately, the bill will not, in our view, accomplish these goals. On the contrary, the principal effects of this bill, if enacted, would be (1) to deprive nonmarket economy ("NME") producers of an injury determination in investigations where it is required under present law and (2) massive administrative confusion.

Confusion of Goals

The bill suffers from a confusion of goals, incorporating certain political aspects of section 406 of the Trade Act of 1974, while attempting to establish neutral economic rules of fair trading by NME exporters comparable to antidumping and subsidies rules for market economy producers. The relative lack of use of the present section 406 has led some observers to believe it is unnecessary. If, however, Congress believes that our trade laws should retain a provision to protect against market disruption deliberately caused by our political enemies, then perhaps section 406 should be retained in its present form. On the other hand, the apparent purpose of S. 958 is to establish a neutral set of rules for the pricing of imports to this country by NME producers. The bill thus apparently addresses trading practices by NME producers which are motivated not by political ends, but by relatively benign purposes, such as a desire to establish their products in our markets and earn foreign exchange. AAEI believes that the bill should be limited to remedying trade practices which are illegal under the GATT Subsidies and Antidumping Codes.

Initiation of Investigations

While we regard the possibility of initation of an investigation by the President, the United States Trade Representative, or by Congressional committees as appropriate under a political statute such as section 406, we believe an investigation of an economic nature should be initiated either by petition on behalf of an interested party or by the administering authority following objective criteria. It is more appropriate and effective if these procedures to prevent, or compensate for, illegal international commercial acts are initiated by parties who are experiencing economic injury. To permit investigations to be initiated though the political process would cause NME countries to question the objectivity of the process and create uncertainty in trade. The possibility of political initiation would also lessen the incentive for petitioners to file petitions with the administering authority presenting information "reasonably available" to them.

Injury Determinations

The elimination of injury determinations from many investigations in which they are required under present law is another example of the confusion of goals behind this bill. Under present law, injury determinations by the International Trade Commission are required in all antidumping investigations, and in all countervailing duty investigations in which the respondent is from a country which is a party to the GATT Subsidies Code (or which has assumed substantially equivalent obligations). AAEI believes an injury test should be required in all countervailing duty, antidumping, or similar investigations of allegedly unfairly priced imports.

The bill provides that investigations which are initiated as artificial pricing investigations and transformed into antidumping investigations as a result of cooperation by the NME respondent are not to involve injury determinations if the respondent is not from a country which is a party to the GATT. This is a potentially very significant change which can only restrict trade. The change from present law, moreover, goes directly contrary to the stated purpose of the bill's sponsor -- to "treat [NME] countries in these cases precisely as all other nations are treated under our laws, even to the extension of the injury test in appropriate cases". In this case, NME producers who fully cooperate with the investigation are deprived of the benefit of the injury test. The bill would prevent American industry and consumers from obtaining the lowest priced merchandise on the world market even when the importation of that merchandise would not cause or threaten injury to any domestic interests.

Cumbersome Procedures

In addition to our concern about the conflicting goals incorporated into S. 958, we are also very concerned about a number of procedures chosen to effect those goals.

S. 958 would provide for a determination de novo in every case of whether the home country of the respondent was or was not a "nonmarket economy country". Like the bill, the present antidumping law provides for a determination by the administering authority in each proceeding whether the home country of the respondent is a "state-controlled economy" based on an adversarial proceeding. In the present antidumping law, however, the purpose of this adversarial proceeding is to determine whether the administering authority will be able to investigate the home market and pricing policies for that product as though the country were a market economy. The inquiry into whether or not imports are from a "state-controlled economy" serves to apply the special provisions relating to state-controlled economies when the need for those provisions are found to be present.

Unfortunately, the definition of "nonmarket economy country" in S. 958 incorporates all the uncertainty and none of the focus of the antidumping law. S. 958 would require in each case a determination whether or not the country of manufacture is a "nonmarket economy country". The definition at issue, however, does not focus on the particular products and market under investigation nor does the definition take into account the informational needs of the administering authority.

Additionally the bill's definition of a nonmarket economy country, as one which operates on principles other than those of a free market, could conceivably apply to subsidized or protected industries and products in any country of the world. AAEI's concern is not so concerned that the administering authority will give an inappropriately broad meaning to this definition, but that the vagueness of the definition itself may force inappropriate applications of the artifical pricing procedure, damaging relations with our major trading partners. It is certain to generate unnecessary debate and litigation.

Another basic defect in the definition of a nonmarket economy is that it looks to the "fair value" of the "merchandise" while the definition of artificial pricing is based on the more specific term "article". Because fair value may not be defined the same as it is under the present antidumping law and because merchandise appears to encompass a range of articles, a country could be designated a nonmarket economy even if the article were sold at a price greater than fair value as presently defined.

Transforming Investigations

The provision in subsections (c)(1) and (c)(2) for the transformation of an artifical pricing investigation into a countervailing duty or antidumping investigation, and for the transformation of countervailing duty or antidumping investigations into artifical pricing investigations is likely to be unworkable. Under S. 958, an investigation which is transformed from one type of investigation into another is supposed to pick up in midstream "at the same point in time as that at which the investigation would have been had it been commenced as such an investigation". This legislative requirement will be impossible for the administering authority and the Commission to comply with.

For example, in antidumping investigations, the Commission must publish a preliminary determination within 45 days after the petition is filed. If, under the bill, an artificial pricing investigation is transformed into an antidumping investigation more than 45 days after the petition is filed, it is not clear whether (1) the Commission's preliminary investigation would be made up at a later time, (2) the Commission's preliminary investigation would be dispensed with and the administering authority and the Commission would assume an affirmative preliminary determination had been made, or (3) the Commission would make a practice of conducting a preliminary injury investigation in every artificial pricing case, so that the results of the investigation will be available just in case the investigation is transformed into an antidumping investigation later. We believe the first alternative is not feasible, since the Trade Agreements Act of 1979 shortened the deadlines for investigations in countervailing duty and antidumping cases to the minimum needed for meaningful determinations capable of withstanding judicial review. The second alternative is clearly unfair to respondents, and also a violation of the GATT Antidumping Code (the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade). Article 10 of the Antidumping Code requires a preliminary determination of both dumping and injury before provisional measures, such as the suspension of liquidation, can be imposed. Finally, the third alternative would be wasteful of investigative resources and excessively burdensome to respondents.

The same problem would exist for each of the investigative steps which are missed when a new investigation is commenced in midstream. To require the government and the parties to conduct all three types of investigation in the early stages until it is determined whether the initial investigation will be transformed into another type, would be unfair and wasteful. Yet to assume the outcome of the early steps of investigations would be to prejudge the cases.

AAEI believes that every investigation should be commenced under the present antidumping and countervailing duty laws. The administering authority should be authorized to transform the investigation into an artifical pricing investigation only upon a determination that information sufficient for a normal dumping or countervailing duty investigation is not being provided by the producer or exporting country. Neither the administering authority nor the petitioner should be allowed to presume that sufficient verifiable data will not be made available.

The Need for a Clear Pricing Standard

The definition of "lowest free market price" may merit further examination as a possible standard for determining foreign market value in an antidumping investigation. We believe, however, that substantial modification is needed for this standard to be useful. In its present form it would penalize an NME producer in some cases for being the most efficient and lowest-priced world producer, and it would deprive American industry and consumers of the lowest-priced available products without any showing of unfairness or detriment to domestic producers. In other cases, it would permit an inefficient NME producer to undersell all but the single most efficient producer in the world, even if the NME producer's prices were far lower than his identifiable costs. The bill would create an incentive on the part of NME producers to refuse to participate in an antidumping or countervailing duty case in order to obtain the advantage of having their prices compared not with their own costs, but with the selling prices of the world's most efficient producer.

We are concerned further that the definition insufficiently circumscribes the class of producers from which a like article is to be selected for comparison. Conceivably, the petitioner's own prices might be the sole basis for comparison; such a situation creates at least the impression of injustice and the potential for abuse of the procedure.

Conclusion

As stated above, we support the goal of the bill's sponsor, to provide a standard for fair pricing of imports from NME countries. We oppose the elimination of the injury test from present law, however, and urge that it be incorporated into all investigations of unfairly priced imports. We oppose the creation of multiple overlapping remedies as proposed in S. 958.

Standards adopted by the United States to cope with the special problems of artificially priced goods sold in international commerce are likely to serve as models for comparable laws in other countries. AAEI is gravely concerned that overly broad or discretionary definitions ultimately may be applied to substantially subsidized U.S. exports, particularly U.S. agricultural products benefitting from price support systems. Thus, the definitions in this bill should be narrowly and carefully targeted so as not to encompass articles from any country which can be dealt with adequately under the present antidumping and countervailing duty laws. We recognize that this is an extraordinarily difficult task, and we query whether the potential consequences of unintended applications of this new mechanism do not argue for retaining the present procedure as the least counterproductive alternative.

If all cases are initiated under present antidumping and countervailing duty laws, the "carrot and stick" approach of this bill has merit. However, we urge the committee to consider earlier proposals to unify in one statutory mechanism all present procedures for relieving injury to domestic industry and labor directly attributable to increased imports. Under such a procedure the importance of the type of behavior causing injury would be subordinated to the degree of injury, the petitioner's circumstances, and the welfare of all other U.S. interests. We believe a unified proceeding would benefit importers, U.S. producers, and the administering agencies by reducing uncertainty, providing relief more precisely tailored to the circumstances of the case, and reducing the ever-growing complexity of trade laws. A discussion of this proposal is contained in the statements of the American Importers Association and of Noel Hemmendinger, Esq., submitted to the Subcommittee on Trade of the Committee on Ways and Means, U.S. House of Representatives for its compilation:

Recommendation Submitted by Interested Individuals and Organizations on Amendments in U.S. Laws to Provide Relief from Unfair Trade Practices, September 5, 1978 (WMCP: 95-99).

Respectfully submitted,

Eugene J Milosh

Eugene J. Milosh
Executive Vice President

EJM:ck

Before the Senate
Finance Subcommittee
On International Trade
On S. 958, a Bill to Amend
The Trade Act of 1974
To Provide a Special Remedy
For the Artificial Pricing
Of Articles Produced by
Non-Market Economy Countries

STATEMENT

OF

THE TEXTILE/APPAREL IMPORT STEERING GROUP

January 29, 1982

The Textile/Apparel Import Steering Group is made up of the 20 trade associations and labor unions listed at the end of this statement. These organizations represent a major part of the fiber/textile/apparel manufacturing industry in the U.S. This industry employs some 2.5 million workers in virtually all 50 states.

This industry is one besieged by imports -- especially low cost imports of textiles and apparel from both non-market and market oriented economies. This is a problem common to textile/apparel industries in other major developed countries, and led to the establishment of a Multifiber Arrangement in 1973 which provides for orderly international trade in textiles and apparel. The MFA was recently renewed in Geneva and included in it is recognition by all signatories that its provisions "shall not affect the rights and obligations of the participating countries under the GATT." All rights under U.S. law are preserved, as are obligations by other countries to refrain from unfair trade practices.

Under the framework of the MFA the U.S. government has negotiated 24 bilateral textile agreements, some of them with nonmarket economy countries. These countries include the Peoples' Republic of China (PRC), Poland, Romania and Yugoslavia. The most important of these as a textile and apparel supplier is the PRC which this year passed Japan as the fourth largest foreign supplier to the U.S., shipping textiles and apparel equivalent to some 560 million square yards.

Therefore, it is clearly in the interest of the United States and its industry and its workers to have in place effective mechanisms to deal with any unfair trade practices which result from non-market price determinations such as those that occur in the communist economies or whenever a particular country nationalizes a particular industry and its prices are set on a non-market basis. To that end we welcome the efforts of Senator Heinz to provide a better means to deal with import prices which are not set by the interplay of market supply and demand. We followed with interest the antidumping investigation on golf carts made in Poland which demonstrated that existing procedures were not adequate to deal with the artificial pricing found in non-market economies. Clearly, there is a problem with present law and regulation; a remedy is urgently needed.

We have examined carefully the legislation proposed by Senator Heinz in S. 958. We support the concept behind it subject to a number of technical changes designed to strengthen the legislation. First, its application should be broadened to cover not only countries that do not have a market economy, whether or not it if communist-dominated, but also any situation where a particular industry is nationalized or subsidized and the prices of the particular product are not a result of the operation of the free market. S. 958 defines a non-market economy as one which operates on principles other than free market such that sales outside the U.S. do not reflect the article's fair value. How would this definition operate in the case of Polish golf carts? Poland had no domestic market for golf carts and exported them solely to the U.S. Would Poland therefore not be considered a non-market economy in this case? We do not believe that the reference to "fair value of the merchandise" in this paragraph is desirable -- it is ambiguous and open to challenge. It is better to say that such sales do not reflect prices established for similar articles in market situations, particularly in the United States.

Our final suggestion is one we believe to be very important to the success of any attempt to deal with artificial prices. On page 8, line 8, paragraph 3, artificial pricing is said to exist when an article produced domestically is imported at a price below the lowest free-market price of like articles. Consider for a moment two countries: Country A, a non-market country, is the major supplier of a product at prices not set by market forces and significantly below U.S. prices. Country B, a market economy in an equivalent state of economic development as Country A, also ships the same product to the U.S. but in much smaller amounts, and at a price just below that of Country A. As we understand S. 958, in this situation because Country A is selling at a price not below the lowest free-market price of a like product, Country A would not be assessed any artificial pricing duties. Moreover, no antidumping or countervailing duty remedies could be sought. This is a serious flaw in S. 958. It must be corrected because while the example we described above was stated hypothetically, many important real-life examples exist in our industry. Furthermore, the bill does not distinguish between shipments from a market economy country that may be substantial and those that may be small, perhaps not even of commercial significance. There is a need to limit the market economy country shipments to those that are of commercial significance.

A better mechanism is needed to provide a remedy to artificial pricing practices -- one which will not exempt an offending country merely because a lower price happens to exist for the goods from another supplying country. If the non-market priced goods are unfairly priced either through dumping, subsidization, or othewise, they should not be exempt from regulation because another country somewhere in the world may be selling some of its goods for less. We suggest that a better criterion in such cases would be a price not substantially lower than the domestic U.S. price for the same or similar articles as a basis for price comparison.

We strongly recommend that these technical problems be dealt with. These changes are essential to our support for S. 958.

ANNEX I

LIST OF MEMBER ORGANIZATIONS OF THE TEXTILE/APPAREL IMPORT STEERING GROUP

Amalgamated Clothing & Textile Workers' Union
American Apparel Manufacturers Association
American Textile Manufacturers Institute
American Yarn Spinners Association
Carpet and Rug Institute
Clothing Manufacturers Association of U.S.A.
International Ladies' Garment Workers' Union
Knitted Textile Association
Man-Made Fiber Producers Association
National Association of Hosiery Manufacturers
National Association of Uniform Manufacturers
National Cotton Council
National Knitwear & Sportswear Association
National Knitwear Manufacturers Association
National Wool Growers Association
Neckwear Association of America
Northern Textile Association
Textile Distributors Association
United Hatters, Cap and Millinery Workers' Union
Work Glove Manufacturers Association

TESTIMONY OF

FOOTWEAR INDUSTRIES OF AMERICA

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

BEFORE THE SENATE FINANCE SUBCOMMITTEE ON
INTERNATIONAL TRADE

ON

S. 958, AMENDING SECTION 406 OF THE TRADE ACT OF 1974

FEBRUARY 12, 1982

COMMENTS OF FOOTWEAR INDUSTRIES OF AMERICA
TO THE SENATE FINANCE SUBCOMMITTEE ON INTERNATIONAL TRADE
ON S. 958, AMENDING SECTION 406 OF THE TRADE ACT OF 1974

Footwear Industries of America (FIA) is a trade association representing domestic manufacturers of nonrubber footwear and suppliers to the footwear industry. We are pleased to have the opportunity to comment on S. 958, legislation proposed by Senator John Heinz amending Section 406 of the Trade Act of 1974 to provide a special remedy for the artificial pricing of articles produced by non-market economy countries. We are joined in these views by the Amalgamated Clothing and Textile Workers Union, AFL-CIO and the United Food and Commercial Workers International Union, AFL-CIO.

FIA supports efforts to ensure fair trade practices with non-market economy countries. Specifically, we support several improvements over current law which the proposed legislation provides:

1. The criterion that sector-to-sector comparisons between free-market and non-market industries be made instead of country-to-country comparisons, to remove an unnecessary degree of arbitrariness in the determination of fair market value of the dumped product.
2. The re-definition of "non-market" as an economic, rather than political, concept.
3. The concept of treating non-market economy countries like any other country. This is unlike current law, which was designed to treat non-market economies differently and gives the President greater latitude in providing import relief in cases involving non-market countries than in cases involving Western economies.

4. The establishment of procedures and time limits for investigations into pricing practices of non-market economies.

It is of critical importance to the domestic footwear industry that measures be adopted to ensure that goods imported from non-market countries be priced to reflect their true costs. We recognize the difficulties inherent in determining costs of production in non-market economies, and are pleased attention is being focused on this issue and that an effort is being made to remedy the problem of artificial pricing.

Of particular concern to the firms and workers in the domestic footwear industry is the rapid increase in exports from one of the largest non-market economy countries in the world, the People's Republic of China (PRC). Excessive levels of Chinese imports, combined with the potential of unfair pricing practices, poses a threat of unparalleled dimensions to footwear manufacturers and indeed to all labor-intensive industries in the U.S. Nonrubber footwear imports from the PRC rose from a mere 404,000 pairs in 1978 to 2.2 million pairs in 1980, and jumped to 7.1 million pairs in 1981, a further gain of 221 percent in the past year alone. With its vast supply of low-wage labor, China clearly posseses the potential to flood our market with footwear, further exacerbating an already severe import problem. The possibility of China dumping its exports in the U.S. market at artificially low prices clearly is intolerable. Thus, it is of utmost importance to devise a mechanism to ensure fair pricing practices.

While we support the objectives of S. 958, FIA does perceive some possible drawbacks to the legislation, similar to the drawbacks in S. 1966 introduced in the 96th Congress. First, the determination of "fair value" hinges on comparisons of "like" products made in non-market and free-market industries. But in an industry such as footwear, the extreme diversity of the product makes it very difficult to determine what constitutes a "like" product. Differences in a product can hinge on minor details of style, construction or material composition. For example, are work shoes being dumped by Rumania which have protective metal toe-caps comparable to work shoes made without toe-caps, but otherwise identical? Is a woman's leather open-toe dress shoe comparable to a leather closed-toe pump? The litigation and administrative tangle which accompanied the application of American Selling Price (abolished in July, 1981) to certain types of footwear illustrates the bureaucratic nightmare that can result when comparing different styles or constructions of footwear. We recommend that U.S. Customs officials work very closely with affected domestic industries in determining what constitutes a "like" product to one being dumped by a non-market economy.

Secondly, there is a critical danger in using the lowest average price of a product produced in a free-market economy as a benchmark for "fair value" price. Potentially, a non-market country which currently does not produce a product as cheaply as a free-market country appears to have the right, under S. 958, to dump its products in the U.S. market at the lowest average price of some free-market country, whereas it could not do so under current law. As Table 1 illustrates, several types of footwear are produced in non-market ecomomy countries at prices higher than those in free-market economies. For example, Czechoslovakia sells work shoes to the U.S. at $12.71 per pair. Hong Kong exports them to the U.S. for an average of $9.07 per pair, the lowest price for a free-market economy. What is to prevent Czechoslovakia or any non-market economy from selling unlimited amounts of work shoes in the U.S. market at Hong Kong's price of $9.07? This would be dumping under current law, but not under S. 958. Similarly, Yugoslavia could lower its price of men's leather athletic shoes from an average of $13.40 to the Philippines much lower price of $6.04.

We recognize that S. 958 is designed to create an incentive for non-market economy countries to co-operate with the U.S. government by providing appropriate market information in a dumping investigation. This information would be used to determine the cost of an article in lieu of the lowest average price of a free market producer. However, instances in which the lowest average price would be used still could be numerous, since requested information may not be forthcoming. In a recent countervailing duty case on footwear from India, for example, India refused to provide the U.S. government with the requested information, and a "best efforts" approach had to be utilized by the Department of Commerce in determining the amount of Indian subsidies on footwear exports. Moreover, even if the cost information is provided, it may not be reliable, given the very nature of non-market economic practices. Furthermore, the information would not be verifiable.

Thus, a better method is necessary to determine the price of an article from a non-market economy country. We suggest that artificial pricing be defined as the price of an article which has an import price below the average of all free market prices of a similar article, rather than the definition currently contained in S. 958.

In summary, Footwear Industries of America supports efforts to assure fair trading practices by taking steps to remedy the problem of determining artificial pricing of goods in non-market economies. However, consideration must be given to the difficulty in comparing "like" products in an industry such as footwear, where numerous items are comparable, although not identical in material or construction. Further, it must be recognized that use of the lowest average free market price as a "benchmark" price for goods produced in non-market economies could create an opportunity for the latter countries to dump goods in the U.S. market at potentially lower free-market prices.

We appreciate the opportunity to present our views on S. 958, and hope that our comments are useful to the Subcommittee on International Trade in its deliberations on the complex question of artificial pricing.

TABLE 1

AVERAGE FOOTWEAR PRICES FOR SELECTED COUNTRIES

(Average price/pair, January - November, 1981)

	Men's Work Shoes (TSUS 700.2610, .2718, .2940, .3527)	Men's Leather Althletic (TSUS 700.3515)	Women's Vinyl Footwear (TSUS 700.5846)
	$	$	$
Romania	9.63	8.25	10.48
Yugoslavia	-	13.40	12.40
Czechoslovakia	12.71	4.43	-
People's Republic of China	8.69	5.58	1.41
Hong Kong	9.07	6.93	1.67
Philippines	-	6.04	2.27
Taiwan	10.52	8.57	4.62
Korea	12.46	7.06	4.60
India	9.47	5.86	2.67
Japan	13.37	12.21	2.42
Canada	25.64	11.59	4.73
Spain	9.31	9.33	8.39
Italy	23.13	10.76	4.38
Brazil	18.80	14.79	2.85
France		15.98	
Thailand		6.50	1.44

KEY POINTS:

o Non-market economies might lower their prices to that of the lowest average free market economy and dump their products in unlimited amounts in the U.S. market. For example, Romania and Czechoslovakia could lower their prices of work shoes to Hong Kong's price and dump them in U.S. markets.

STATEMENT OF L.L. JAQUIER
EXECUTIVE VICE PRESIDENT, W.R. GRACE & Co.
on behalf of
DOMESTIC NITROGEN PRODUCERS' AD HOC COMMITTEE
BEFORE THE SUBCOMMITTEE ON INTERNATIONAL TRADE
COMMITTEE ON FINANCE
on S. 958

I am L. L. Jaquier, Executive Vice President and Agricultural Chemicals Group Executive, W.R. Grace & Co. I am also Chairman of the Domestic Nitrogen Producers Ad Hoc Committee, which is a group of twelve producers of ammonia and nitrogen fertilizers.[1] This group was formed to address growing problems in U.S. - Soviet countertrade affecting nitrogen fertilizers and U.S. agricultural trade policy as it relates to nitrogen fertilizer production and consumption in the U.S. We appreciate the opportunity to comment on the proposed legislation by Senator John Heinz, S. 958, which would amend Section 406 of the Trade Act of 1974. S. 958 would eliminate the market disruption theory of Section 406 and replace it with a special remedy for the artificial pricing of articles produced by a nonmarket economy. This artificial pricing remedy would be a substitute for regular dumping or countervailing procedures when adequate information is not available or obtainable to bring such actions under current law.

The Ad Hoc Committee's experience with Section 406 leads us to the conclusion that the current law is inadequate to deal with nonmarket economy countertrade problems that threaten market disruption of domestic markets. It is also inadequate to resolve questions of preventing undue dependence on vital materials from nonmarket economies as was the apparent intent of the Senate Finance Committee when the Senate passed Section 406 in the Trade Act of 1974.

THE SECTION 406 SOVIET AMMONIA CASES

The Ad Hoc Committee filed a petition in July 1979, alleging market disruption arising out of the fertilizer countertrade deal between Occidental Petroleum Corporation and the Soviet Union. This is the only large countertrade problem that has been presented under Section 406. The International Trade Commission determined in October, 1979, by a vote of three-to-two that market disruption existed and there was a risk of undue dependence on ammonia, as a nitrogen fertilizer. The ITC recommended quotas of 1 million short tons of Soviet ammonia imports in 1980, 1.1 million tons in 1981 and 1.3 million tons in 1982. President Carter rejected that relief in December 1979, on the grounds such relief was not in the national economic interest.

Following the Soviet invasion of Afghanistan a few days later, President Carter reversed his decision and in January, 1980, recommended an emergency quota of 1 million tons of Soviet Ammonia for 1980 and requested the ITC to institute a new Section 406 proceeding to determine the existence of market disruption. The President had also embargoed a portion of U.S. grain and all phosphate fertilizer exports to the Soviet Union. However, in the meantime, Commissioner Michael Calhoun had replaced Chairman Parker, who had been one of the majority in the first case. Commissioner Calhoun joined with the minority Commissioners from the previous case and the ITC determined that no market disruption existed by a vote of three-to-two, thereby reversing the previous decision and terminating the emergency quotas.

NO SECTION 406 RELIEF IN COUNTERTRADE CASES

Commissioner Calhoun filed a separate consenting opinion discussing whether there was a potential under the contract for rapidly increasing imports which could be a significant cause of a threat of material injury. This is the "flooding" criteria under Section 406. While he found there was a threat of such rapidly increasing imports, he joined in the majority opinion, that such imports under a countertrade agreement could not be a significant cause of a threat of material injury under the law.

Besides the flip-flop nature of the decisions of the ITC and the President, which at best would leave the state of the law in doubt, the minority Commissioners in the first case, who became the majority in the second case, made a specific finding on the question of whether a countertrade agreement could ever be the significant cause of a threat of material injury under Section 406. Commissioners Alberger and Stern first stated that the intent of Section 406 was the same as the intent under Section 201 which was that the threat of injury exists when that injury, although not yet existing, is clearly imminent if import trends continue unabated. They then stated, "We cannot believe that the notion of flooding contemplates slowly-increasing market penetration over a long period of time."[2] This determination will virtually exclude a finding of market disruption under Section 406 because almost any long-term countertrade involving a sufficient volume of goods to threaten injury would, by its very nature, result in gradually increasing market penetration over a matter of several years. Thus, whether a threat of injury is "imminent" is an inappropriate if not impossible test to meet in countertrade cases regardless of the injury that could be shown as a probable result when the countertrade was fully underway.

We refer the Committee to a law review article to be published in one or two weeks in Law and Policy in International Business (Vol. 14, No.1, 1982) by Philip H. Potter, a Senior Associate with Charls E. Walker Associates, Inc., discussing these cases.[3] We will provide the Committee with a copy of that article when it is released.

The law review article outlines the nature and forms of countertrade with nonmarket economies, and particularly the Soviet form of centrally-controlled, command economies; the inherent economic and political forces in these economies which conflict with supply-demand forces in Western economies; artificial pricing practices which result in "marginal pricing" and the distorting effect such practices have on supply-demand forces in the U.S. economic system; and an analysis of why Section 406, Section 201, Dumping and Countervailing Duty laws are ineffective from an economic and political standpoint to deal with countertrade from nonmarket economies. Our statement will address those subjects as they relate to the artificial pricing remedy proposed under S. 958.

INTERNATIONAL UNFAIR TRADE PRACTICE ANALOGIES ARE INAPPLICABLE TO NONMARKET ECONOMY TRADE PRACTICES

The fair trade rules used in Western international trade simply do not apply to trade with nonmarket economies. Western unfair trade practice analogies are inapplicable to nonmarket economy trade because of the mismatch between the two economic systems. Western international trading rules are based on the mutually accepted premise that if unfair trading practices such as dumping below home market prices and subsidization are curtailed or restrained, then supply-demand forces in the marketplace, production costs and the profit motive will force buyers and sellers to trade fairly. Those market economy forces simply do not act as an effective restraint upon nonmarket economy production, export sales and pricing decisions.

The problem was best described by Senator Heinz in his statement on introduction of S. 958.[4] We fully agree with the following quoted portion of that statement.

> Conceptually finding a way to deal with market disruption by nonmarket economies is complicated by theoretical and practical differences between free market and nonmarket structures. For example, dumping, a peculiarly free market concept, is based on a comparison between a product's price in its country of origin and its price in the United States, or alternatively, between its cost of production in the country of origin and its U.S. price.
>
> ... In other words, the administering authority must be able to accurately obtain the price in the home country or the cost of production, and such prices should reflect true economic costs.
>
> In a nonmarket economy, however, such comparisons cannot be made with any confidence. Prices within such a country do not necessarily reflect the interaction of supply and demand in any realistic sense, and costs of production are equally difficult to measure because of the unreliability of product input costs and the difficulty of separating Government subsidies from true input costs. In a centrally planned economy such distinctions are simply not made in the same way they are made in capitalistic economies. Moreover, price inconsistencies are particularly likely to occur in the export sector, because of the nonmarket economy's interest in promoting exports as a source of foreign exchange to aid in internal industrial development or other governmental policies. As a result, it is often fair to say that the export sector of these economies is more advanced and relatively more heavily supported by the Government than other sectors.

If the self-policing, marketplace forces of supply-demand, production costs and the profit motive which exist in Western economies will not cause nonmarket economies to act consistent with those forces in the marketplace, then some "artificial" rules of the game must be substituted for those real economic forces. Without such rules, we are faced with two unacceptable choices. Western sellers are forced to forego trade with nonmarket economies, which is unrealistic; or competing Western producers are relegated to accepting the injection of distorting, nonmarket economic forces in their marketplace. Either choice creates irresolvable political conflict and damaging economic results. These problems are most forcefully presented in countertrades under current law.

S.958 DOES NOT PROPOSE EFFECTIVE RULES OF THE GAME

The stated objective of S.958 is to encourage nonmarket economies to "develop the attributes of market economies" and the intent is to create an incentive for them to do so.[5] The legislation is based on the premise that U.S. trade law "should, where possible treat nonmarket economies like anyone else."[6] The legislation assumes that verifiable information exists in nonmarket economies to adequately determine a product's price or its cost of production in the country of origin and that such prices or costs do or can be interpreted to reflect true economic costs or fair value. The only problem is in getting that nonmarket economy to furnish that information on a cooperative and verifiable basis. It is just barely conceivable that such information could be obtained from a few Eastern European countries which have sufficiently modified the Soviet command economy model to actively participate in the Western economic system. That is certainly a desirable goal, but the recent Polish experience indicates that politics may override those efforts. To be effective, any U.S. law would have to deal differently with each nonmarket economy country depending on its cooperative attitude and level of adoption of market economy attributes. The alternative structure of S. 958 is a way to get at this problem mechanically, but the artificial pricing alternative would be wholly ineffective to deal with long-term countertrade deals.

Even if one ignores the recent Polish experience and assumes that trade will increase between the U.S. and nonmarket economies, the remedy of comparing the price of imported nonmarket economy products with the "lowest free market price of like articles" will not have the persuasive result intended in most cases and certainly will have no effect at all on most countertrade.

It is true that a lowest free market price standard can be more easily established than a fair value determination, but that may be a benefit enjoyed only by the investigators and attorneys charged with presenting the case. In many, if not in fact virtually all, cases such a pricing standard may well be acceptable to a nonmarket economy or a Western selling partner involved in a nonmarket economy countertrade deal. In fact, investigators would almost certainly soon discover that such a price was the very price picked by the nonmarket economy to price its goods for export sales in a particular country. This is the "marginal pricing process described by Professor Raymond Vernon in an article titled, "The Fragile Foundation of East-West Trade," published in Foreign Affairs in the Summer, 1979 volume. This marginal pricing process is also described and analyzed as it relates to countertrade in the law review article in International Law and Policy which we mentioned above.

Nonmarket economies do not directly link costs with prices, particularly export prices, as Senator Heinz has pointed out. Their export sales goals for manufactured goods tend to be volume based determined by their desire for hard currency and to offset purchases of Western technology and products. Because most nonmarket economy manufactured goods are not in great demand in the West and most nonmarket economies do not and generally will not invest in an extensive marketing apparatus, they are relegated to selling at "marginal prices." Professor Vernon describes that marginal price as the nearest competitor's price discounted just enough to achieve the sales goals set. Those sales goals, usually stated in volumes of goods, are set without regard to supply-demand balances in the selected Western economy and are not varied to maintain any set price levels as supply or demand varies for that "like product" in the Western economy involved.

We believe the U.S. ammonia market furnishes a good example of how this pricing process will affect a U.S. market. Over half of the ammonia produced and consumed in the U.S. is produced in the Gulf Coast area, specifically in the states of Louisiana, Texas, Oklahoma and Mississippi. Ammonia is sold in the U.S. in a highly efficient and competitive commodity-type market. Approximately 70 percent of the production costs of ammonia is for natural gas used as a feedstock and in the production process. Availability and price of natural gas is one of the most significant factors in ammonia production. Ammonia is sold principally as a nitrogen fertilizer for direct application or as the base for nitrogen fertilizers in the agricultural regions of the country, most of which is used in growing corn, feed grains, and wheat. Wholesale prices in those regions generally reflect Gulf Coast production prices plus transportation, but the price is highly sensitive to grain prices. Demand fluctuates seasonably and prices reflect that demand.

The Gulf Coast spot price is the average price of producers' asking prices in that area. These prices are generally the "lowest price" in the U.S. ammonia market. Mexico also makes ammonia sales in this market, and their prices generally reflect the Gulf spot price. Occidental Petroleum and the Soviets commenced sales of ammonia in the U.S. in 1978 under their countertrade deal. The Oxy/Soviet deal called for an exchange of phosphate for ammonia, urea, and potash over 20 years with the dollar values to equal out over the term of the contract - in effect a barter. In addition, Oxy was to sell between 600,000 to 1,000,000 metric tons of ammonia,for the benefit of the Soviets, to generate $900 million over 10 years to repay private and Export-Import Bank loans used to purchase equipment and technology - a compensation or counter-purchase deal which is another form of countertrade. The Soviets priced the ammonia at prices just above, at or just below the then current Gulf Coast spot price, depending on other terms. Some sales were made with volumes fixed for up to ten years and some had fixed prices for up to three years with nominal escalation clauses. All of this information was presented and documented in the two ITC cases investigated in 1979 and 1980.[7]

These pricing practices clearly fit the "marginal pricing" process and would certainly have generally met the "lowest free-market price" standard of S.958. Under S. 958 such sales, even though through long-term contracts under 10 and 20 year countertrade deals, would probably not have constituted an "artificial pricing practice" under S.958.

At the time, supply exceeded demand due to excess capacity built in the U.S. in 1975-1977 in response to shortages in 1973-1974. Those shortages developed under wage-price controls and prices had risen rapidly following the first major OPEC oil price increase. Demand growth was not and has not been sufficient to consume all of this production capacity and over 3 million tons of capacity has been closed or idled since 1977. Many of the closed plants were smaller, obsolete plants which is an expected result in an efficient market. Several of the idled plants were large, modern plants, however, and were also higher cost plants due to the higher price of gas. Thus, a significant portion of the problems faced by the U.S. ammonia industry were a function of construction of excess capacity, rapidly increasing gas and production costs and less than anticipated demand growth due to weaker grain markets relative to the cost of fertilizer.

I want to state clearly at this point that we are not submitting this testimony to retry those cases. Nor are we stating or implying that current sales or pricing of Soviet ammonia under the countertrade deal constitute an unfair trade practice or market disruption. 1981 Soviet import levels, which were 700,000 to 1 million tons less than anticipated, do not appear to be impacting the U.S. ammonia market adversely.

As a result of those cases, however, we did gain some knowledge and experience over the last four years about nonmarket economy countertrade, pricing practices and the distortions such trades and practices create in the supply-demand forces in our marketplace. The principal lesson we learned was that the overriding considerations of a large countertrade transaction will result in a nonmarket economy accepting marginal prices and selling increasing volumes of product into a market experiencing excess supply, depressed prices and increasing costs. The record in the two ITC cases clearly shows that U.S. producers were selling in the Gulf Coast spot market at prices below their average production costs and in some cases below their marginal costs in 1978 and most of 1979. This particular marketplace serves as the principal market for marginal production, i.e. a producer's last units of production. Thus in surplus or weak demand conditions, prices are low relative to average production costs and vice versa. The Soviets ignored these conditions in the marketplace and entered into long-term, fixed price contracts anyway.

The Soviets attempted to achieve the sales goals under the countertrade even though more favorable demand and prices existed in Europe. In 1978 the Soviets sold slightly over 300,000 tons of ammonia in the U.S. market. In 1979, they sold almost 800,000 tons for four percent of the market. In 1980, they sold over 1.1 million tons for six percent of the U.S. market and one-third of all imports into the U.S. These sales were made in spite of the embargo of grain and phosphate sales to the Soviets in January, 1980. Occidental indicated at the ITC hearing in February, 1980, they anticipated sales of 1.5 - 1.8 million tons in 1981 and around 2.0 tons in 1982. Soviet ammonia sales for 1981 now appear to be around 800,000 tons, 700,000 to 1,000,000 tons less than planned under the countertrade, reflecting the overall decline in U.S.-Soviet trade. Sales of the estimated amounts would have resulted in a market penetration of 10-15 percent of the U.S. market. Since virtually all of the Soviet ammonia was to be sold for fertilizer, their share of the nitrogen fertilizer market would have been significantly higher. The ITC quotas proposed in the first ammonia case would have limited penetration to approximately five percent of the U.S. market. The countertrade when fully executed would involve sales of 2.3-2.75 million tons of Soviet ammonia.

U.S. ammonia demand grew about a total of 1 million tons from 1978 through 1980. While Soviet imports increased, other imports declined. At the Soviet import levels of 1980, U.S. production stabilized. But the injection of Soviet imports at levels substantially over 1 million tons per year, without equal reductions in other imports or U.S. production, would exceed annual demand growth and would distort that supply-demand balance. With Soviet ammonia exports to world markets also projected to increase, U.S. producers would be hard pressed to export their surplus and something would have to give.

A brief comparison of 1980 and 1981 U.S. production, imports, exports and total consumption will illustrate what the effect of an additional 1 million tons of Soviet ammonia would have been on the U.S. market. Total U.S. ammonia production was 19,153,600 tons in 1980 and 19,145,100 tons in 1981. Total imports were 3,400,000 tons in 1980 and 3,113,400 tons in 1981. Of those amounts, Soviet imports were 1,103,660 tons in 1980 or 32.5 percent of all imports, and dropped to 797,560 tons in 1981 or 25.6 percent of all imports. Soviet imports were scheduled to be 1.5 to 1.8 million tons in 1981. Imports from other sources were basically unchanged from 1980 through 1981. The drop in total imports was almost totally accounted for from the drop in Soviet imports.

Domestic consumption in 1980 was 19,084,146 tons of which 14,104,878 tons were in the form of nitrogen fertilizer. Domestic consumption in 1981 dropped to 18,198,902 tons of which 13,198,780 tons was in the form of nitrogen fertilizer. Ammonia used for other purposes was virtually identical in both years. The drop was all in fertilizer. Exports of nitrogen in tons of ammonia equivalent were 3,850,000 tons in 1980 and 2,947,561 tons in 1981. Inventories account for the differences in totals. It is significant that ending inventories were up over 1 million tons in 1981 from 1980.

It is easy to see what happened. U.S. production remained about the same. Imports dropped around 300,000 tons in 1981. Domestic consumption of fertilizer dropped 900,000 tons in 1981. Exports fell 900,000 tons as well and inventories were up over 1 million tons. If Soviet imports had reached projected levels in 1981, they would have added another 700,000 to 1,000,000 tons to total supplies in the market -- at least another 5 percent excess. It could not be taken out by U.S. producers increasing stored inventories. There would probably not have been adequate storage facilities. U.S. producers would have to cut production by significant amounts. That amount of cutback could only be achieved by shutting down several plants due to the nature of the technology. At this point, unless grain prices improve dramatically, we do not foresee an increase in demand for spring planting in 1982 over 1981.

Prices dropped from around $175 per ton in mid-1981 to around $133 per ton in December, 1981. Prices are up some in January as dealers start building up supplies for the spring which is the high demand season. Natural gas prices increased an average of 20 percent in the same period in 1981.

The point of reviewing the supply-demand forces of the U.S. ammonia market is to illustrate that so long as the Soviets are willing to accept marginal prices - which would be virtually the same as the lowest free-market price standard of S. 958 -- they would increase U.S. supplies significantly in excess of demand. In fact, they were willing to do so up to 1981 in spite of inadequate demand to justify sales at those levels. The result in the U.S. market would be certain. Either prices would drop below average production costs or even marginal production costs for a significant segment of the industry; or some U.S. producers would be forced to close their plants; or some combination of both.

The long-term result of this process will be declining profit ratios, declining production, decreased capacity utilization and loss of capital investment and recovery. Investment in the U.S. will be shifted away from such an industry and we will become increasingly dependent on imports.

If this were the result of a comparative advantage based on real economic costs and values, we would have little ground to complain. But U.S. ammonia production is the most efficient and modern plant anywhere in the world. The Soviets have built enormous capacity by buying Western plants and technology in recent years but are still highly inefficient in their operation. Given other fixed costs for capital, labor and transportation - even under the Soviet pricing and economic system - the Soviets must have valued their natural gas input production cost at a nominal or even negative value.

So long as the Soviets are willing to accept marginal prices which would be among the "lowest" in the marketplace, and choose not to vary their production and sales to respond to demand growth levels or changes, the Western free-market system cannot stop them. The supply-demand, production cost and profit motive restraints in our markets will not produce similar restraints on their economic system when there is a shift in supply or demand in our markets. Their production and export sales will distort Western markets to the extent they are not responsive to those supply-demand forces.

S.958 WILL ENCOURAGE RATHER THAN DISCOURAGE THESE ADVERSE ECONOMIC RESULTS

S. 958 will not necessarily force nonmarket economies to provide verifiable data in dumping or countervailing duty investigations. The lowest free-market price is not an incentive to do so. Nonmarket economies are prone to use marginal prices - the nearest competitor's price - which would most often, if not always, be the lowest free market price, so they would most likely accept just that price and sell as much as they wanted. S. 958 simply locks in and legitimatizes marginal pricing and allows a nonmarket economy to continue to ignore supply-demand factors in our markets and do so legally. If a nonmarket economy choses to export significant quantities of a product into a U.S. market, relative to the size of that market, over a long period, they can achieve full market penetration for that product at acceptable prices under S. 958. S. 958 recognizes the problem inherent in trade with nonmarket economies, but misses the mark with the proposed "lowest free-market price" remedy. The economics don't work out. It may be good for the lawyers and government officials who must investigate and try such cases, but it is bad for business, whichever way it works. It will not restrict unfair trade practices from nonmarket economies, particularly the use of unfairly low prices, but instead will simply incorporate and legitimatize the unfairly low or marginal pricing practices of those economies, which are not based on or motivated by real economic values. We would simply be doing their job for them and making it easy. U.S. producers clearly have no economic defenses. S. 958 removes any chance for having any legal defenses.

LOWEST FREE MARKET PRICE DOES NOT NECESSARILY REFLECT LONG RUN PRODUCTION COSTS

The "lowest free market price" remedy is offered as a substitute for the "fair value" standard or what we consider long run costs of production in dumping and countervailing duty cases on the assumption that the lowest free-market price standard will correspond with or accurately reflect actual production costs. It assumes that the lowest market price represents long-run production costs - and that is where it goes wrong.

Long-run production costs accurately reflect true comparative advantage in the home country market. The lowest free-market price, on the other hand, may only reflect short-run marginal costs, particularly in the case of state controlled exports. In the short-run, marginal costs may vary widely across an industry or between free-market economies, and can certainly fall below long-run minimum average production costs. Short-run marginal costs may not fully account for depreciation, overhead, marketing expenses and cost of capital. Any trade law that permits a nonmarket economy - which is not constrained by such costs - to capture a significant market share of our markets at prices that reflect only short-run marginal costs -- rather than the true economic costs of continued production -- will suppress investment in that industry and impair its productivity. Furthermore, if it allows such a result when it is not based on a true economic comparative advantage it violates fair trade principles.

The "lowest free-market price" standard appears to be an unrealistic legal definition. It does not accurately reflect or account forthe underlying economic forces that produce it in all or even most instances. It will not reinject those economic forces back into the nonmarket economy. "Fair value" recognizes real economic values and forces where it exists in free-market economies. It does not exist in nonmarket economies in market economy terms. Therefore, it is impossible to show it in legal terms under market economy fair trade terms. Fair value in nonmarket economies is a square peg in a round hole. The simulated constructed value approach proposed by GAO in its report dated September 3, 1981, titled "U.S. Laws and Regulations applicable to Imports from Nonmarket Economies Could Be Improved" would seem to be a sligthly better approach, particularly if U.S. cost factors could be considered in the simultation.

COUNTERTRADE IS UNIQUELY TRADE DISTORTING

The Commerce Department estimates that countertrade will account for 10 to 20 percent of world trade in the 1980's.[8] The Department has stated, "Countries extending demands for CT generally realize that this practice does not necessarily stimulate improvements in the efficiency or quality of their production enterprises. The CT goods seldom satisfy the import needs of Western exporters and often may saddle them with compensating goods of inferior quality or for which they have no demand; the goods also may disrupt established supply sources and shift production capacity to the importing country. Yet, the Communist countries and many developing nations feel nowadays that CT transactions are a must for the time being in order to reduce trade deficits, foster exports, permit financing of domestic capital projects, and minimize outlays of scarce hard currency."[9] The incentives for countertrade are present with Communist countries and many lesser developed countries which need Western goods and technology but whose own industrial export goods have limited marketability in those same Western markets. These countries also lack sufficient hard currency to purchase desired goods outright.[10]

There are three general forms of countertrade. Compensation agreements involve repayment in the product that results from the purchase of a plant or technology from a Western company. These are normally large transactions and may have a term from 5 to 20 years. The purchase of the Western plant and technology is normally financed by Western credits that are repaid out of the sale of the resulting product. The delivery of the product may lag several years behind the contracting for the plant itself.[11]

Counterpurchase agreements are similar and may also involve Western credits, but they do not involve repayment with resulting product. Instead an unrelated product may be sold by the Western partner in its markets. The two contracts for the sale of Western goods or technology and the responding sale of Eastern goods are linked by a protocol or some similar agreement. These transactions are accounted for in Western hard currencies and the two sides of the trade may or may not equal each other in value.[12]

Both forms of countertrade present problems in pricing and valuation of nonmarket economy goods. The volumes are agreed upon and prices are supposed to be renegotiated and adjusted from time to time to reflect world market values in most transactions. The actual process, however, appears to evolve into direct negotiations between the parties on acceptable prices to each but which may or may not reflect world prices. There is clearly some requirement to attempt to balance the values on either side of the transaction.

The third type of countertrade, barter, is essentially a direct exchange of goods which are valued equally without any flow of money -- two apples for three oranges for instance.[13] In practice the goods on each side are valued in hard currency, cash changes hands, but the values are required to equal out over the full term or lesser periodic terms.

The Occidental/Soviet countertrade contains some elements of all three types of transactions.[14] A recent article titled "Doing Business in the Soviet Union" and appearing in Law and Policy in International Business, points out that countertrade arrangements are not necessarily based on the product needs of the Western party and can have a retarding effect on Western production.[15] For a Western company to assume the Soviet product it must either curtail production or defer investment.[16] This article also noted that the products the Soviets and East Europeans will be producing in greatest abundance under these countertrade arrangements will be plastics, fertilizers and petrochemicals which have been in oversupply in Western markets and could result in growing pressures for import relief.[17] Continuation of this mutual oversupply situation should have some dampening effect on future compensation agreements but the opposite seems to be the intent of the Soviets who maintain that such countertrade agreements are critical to any expansion of East-West trade.[18]

The very nature of countertrade agreements compound the valuation and pricing problems already discussed. The fixed volumes and long-term nature of the agreements pressure the partners to sell the nonmarket economy product at marginal prices. Where a significant sale of Western goods and technology has already taken place and been financed it must be paid for, and in the resulting or counterpurchase product, for the terms of the contract to be met and the Western banks' loans repaid. The original nonmarket economy decision and motivation will not be based on strong demand for the resultant or counterpurchase product in Western economies. But once one-half of the deal is completed the other half must be. The nonmarket economy product must be sold regardless of the demand levels in the Western economy for the product or the production curtailment that might cause for domestic producers.

These transactions develop over several years and will normally result in a gradual buildup of nonmarket economy exports as plants and processes come on line and start producing. These agreements do not result in a sudden and short-lived "flood" of product as contemplated by Section 406. Yet the ITC has now determined that such a gradual increase in nonmarket economy product under a typical countertrade deal could never constitute market disruption under Section 406.

S. 958 will not prevent the resulting curtailment of production or deferral of investment in the domestic industry since it provides the legal pricing method for the nonmarket economy to achieve market penetration to the full extent of the countertrade agreement. Remember, the volume of the return product from the nonmarket economy is not based upon or responsive to the demand forces in our marketplace. It is based on and responsive to the requirement to pay for the other side of the deal on the purchase of Western goods, plant or technology.

Not only do such countertrade agreements cause distortions in our markets, there is no relationship to Western fair trade practices at all. If a U.S. producer would attempt to reach this transaction through a Section 201 escape clause action, it merely forces other market economy countries, which are presumably trading fairly under international trading rules, to compete for quotas or sell under tariffs in competition with the nonmarket economy. If they do so, they would risk dumping charges or lose their market if they cannot sell at the same marginal prices charged by the nonmarket economy. The Senate Finance Committee report on Section 406 of the Trade Act of 1974 specified that a principal objective of Section 406 was to prevent nonmarket economies from forcing established free market trading partners out of U.S. markets. Yet that would be the result under Section 201 or S. 958. Such results raise serious questions about nondiscrimination under GATT.

A PRACTICAL APPROACH TO DEAL WITH COUNTERTRADE

Since free-market economic forces cannot operate as a restraint against nonmarket economy countertrade and the "lowest free-market price" remedy may well have the opposite effect from what is intended, what sort of rules of the game could be devised to substitute for economic forces?

Western governments should not intervene in the intial negotiations since that runs counter to free-market economic principles. Furthermore, if the U.S. Government were charged with negotiating or approving the amount of goods that could be imported from a nonmarket economy under a countertrade, it would amount to market allocation of the U.S. market. Either some arbitrary market share would have to be picked or the amount of goods would be determined by the value of the sale of the Western goods on the other side of the transaction. There would still be no accurate method to value the nonmarket economy goods. Besides being grossly unfair to U.S. producers such a procedure raises serious legal issues.

Several practical and legal approaches do suggest themselves, however:

First, a Western seller could be required to file information with a Government agency such as the Commerce Department or USTR that it intends to or has entered into countertrade negotiations and identify the potential nonmarket economy goods and the possible volumes and values involved. The appropriate agency could file a public notice of the proposed transaction appropriately protective of proprietary information. That Department could also provide appropriate information to the nonmarket economy concerning the potential market involved, its nature, characteristics, production and consumption levels and pricing information. That agency could also advise the Western seller and the nonmarket economy of the trade laws and the requirements that would apply under U.S. law or international trade rules. The agency could possibly go so far as to suggest alternatives to a countertrade if such were feasible.

Second, Section 406 should be amended in several respects as it would apply to countertrade. The "flooding" requirement should be eliminated with regard to countertrade and the "threat of material injury" standard should be specifically defined to apply to long-term transactions since the injury may not be immediate or "imminent." "Significant cause" should be defined to recognize the additions to supply that occur in such transactions without regard to domestic demand growth or changes.

Third, and most importantly, the remedy for such a threat of market disruption should recognize the priority of quotas as the most effective remedy, since tariffs have the same pricing deficiency problems of S. 958. However, any recommended quotas should be suspended pending compulsory "consultations" or negotiations by the U.S. Government with the nonmarket economy. Such consultations should be similar or comparable to binding arbitration or orderly marketing agreements.

Such consultations were required in the 1972 Trade Agreement between the U.S. and U.S.S.R. which never went into effect and are contemplated under Section 405 of the Trade Act of 1974 as a requirement for nondiscriminatory treatment (Most Favored Nation Status) under any bilateral trade agreements negotiated with nonmarket economies. The President should not be given such broad discretion to reject any relief after an ITC recommendation for remedy except under clear national security considerations. The

Executive should be required to conduct negotiations even under strained diplomatic circumstances. This is required since both sides of the transaction are entitled to fair and reliable treatment under the law. Certainty and predictability are necessary in commercial affairs for both sides. Trade cannot flourish in an unpredictable political climate.

Fourth, and finally, the bilateral trade agreement establishing the consultive arrangement and Section 406 could require the nonmarket economy country to provide verifiable information on what amounts to a "fair value" determination on the products in question over the remaining term of the countertrade agreement. This might provide adequate information for a dumping or countervailing duty investigation in the event of any future complaints by the affected domestic industry. It is not clear that such information would be available, applicable or adequate but it would be an improvement over present conditions.

Market disruption is a more applicable theory in countertrade deals than any substitute for dumping or countervailing duty theories due to the nature of the transaction.

Such procedures would provide a more realistic and fair result in most countertrade cases given the inherent mismatch between market and nonmarket economies. They would require both governments to follow established, mutually agreed-upon procedures, even under strained diplomatic conditions, and provide greater certainty to all parties. Realistically, disputes of this nature can only be resolved under present conditions through negotiations. The negotiation process itself also offers the hope of improving trading relations between market and nonmarket economies.

This approach is not without its shortcomings and pitfalls but it is clearly a more realistic and preferable approach than that proposed by S. 958 as it relates to countertrade. We simply cannot convert nonmarket economy trading practices into something that will fit our unilateral definitions of dumping and subsidization--no matter how much we may wish that trade with nonmarket economies would operate under our market economy rules. It simply will not operate under market economy principles. We should just accept that and develop a realistic alternative then negotiate that approach through bilateral trade agreements. Section 406 then would become the trigger for specific negotiations to fairly resolve the matter.

If the current laws and regulations regarding Section 406, dumping and subsidization are futile exercises, we urge the Committee not to adopt another futile exercise as a substitute. Particularly when that exercise may be more than futile and can result in the opposite effect than that intended.

FOOTNOTES

[1] The members of the Committee are Agrico Chemical Co., CF Industries, Inc. Center Plains Industries, Felmont Oil Corp., First Mississippi Corp., W.R. Grace & Co., International Minerals & Chemicals Corp., Mississippi Chemical Corp., Olin Corp., Terra Chemicals International,Inc., Union Oil Co. of California, Vistron Corp. and Wycon Chemical Co.

[2] Anhydrous Ammonia from the U.S.S.R., ITC TA-406-5, p.33,October, 1979.

[3] Walker Associates has served as a consultant to the Ad Hoc Committee on these cases.

[4] Congressional Record, S3782, April 9, 1981.

[5] Congressional Record, Senator Heinz, S.3782; April 9, 1982.

[6] Id.

[7] Anhydrous Ammonia from the U.S.S.R., ITC, TA-406-5, October, 1979, and TA-406-6, April, 1980.

[8] Countertrade Practices in East Europe, the Soviet Union and China," Pompiliu Verzariu, U.S. Department of Commerce, International Trade Administration, April, 1980, p.5.

[9] Id. pp. 1-2.

[10] Id. p.2.

[11] Id. pp. 8-10.

[12] Id. pp.7-8.

[13] Id. pp. 11-12.

[14] This transaction is described in Occidental Petroleum Corp. Form 10-K for 1978-1980 filed with the SEC and are also described in the Staff reports of the two ITC investigations.

[15] "Doing Business in the Soviet Union," Law & Policy in International Business, Vol. 13, No.1, 1981, p.41.

[16] Id.

[17] Id.

[18] Id., p. 42, ftnt. 256.

February 11, 1982

Mr. Robert Lightheiser
Staff Director
Senate Finance Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Lightheiser:

I am writing in regard to Senator John Heinz's bill S958 which attempts to change our import laws with respect to non-market, Eastern block countries. Given the possibility that this change might unduly liberalize trade with those countries, which at this very moment are offering the world a shocking testimony to the brutality of their Soviet master, it seems to me that we must be very careful about the technical and legal concepts at stake here. Yet it is these very concepts that I believe to be hopelessly flawed.

In the first place, the bill would abolish Section 406 of the Trade Act of 1974 and replace it with a two-step procedure for testing the prices of goods imported from these countries. This move would eliminate the President's only discretionary authority to restrict imports from communist countries if they are harming U.S. industries -- to say nothing of the political leverage of such authority, leverage the U.S. can ill-afford to abandon.

More important, however, the bill is built upon presuppositions that are both misleading and fallacious. It requires, for example, that communist countries "prove" they are "market-oriented." It also requires the Commerce Department to ask for data proving the existence of such market-orientation which, if deemed "adequate," would presumably be used by the Department to carry out a full anti-dumping case against such a communist producer. These provisions, however, ignore the following facts:

(a) There is no genuine, decentralized pricing mechanism in any of the countries of the Eastern block, not even in Hungary. As Professor Edward A. Hewett, testifying before the Joint Economic Committee, said on February 27, 1981, "the ost important aspect of the NEM (the New Economic Mechanism) was to be the price system.... These state-determined prices were to influence approximately 75 percent of the value of consumer goods, and about 30 percent of that producer's goods.... The system never worked well apparently because the center could not find the will or the political power to enforce it, which became glaringly obvious after 1974."

(b) Most investment is by the government. Even in Hungary, to quote Professor Hewett, "ninety percent of investment... is undertaken directly by the central government."

(c) The Constitution of every communist country provides for state intervention in the economy, for "the common good": this is a built-in instrument prohibiting economic freedom.

(d) The existence of CMEA and its long-term quantitative agreements make it virtually impossible for any CMEA member to realistically break away and initiate its own economic reforms. This is what Egon Neuberger has called the "legacies" of Soviet-type central planning, a term he applied to Yugoslavia (see his article entitled "Central Planning and Its Legacies: Implications for Foreign Trade," in Alan A. Brown and Egon Neuberger, eds., International Trade and Central Planning (Berkeley: University of California Press, 1968), pp. 349-377). Other legacies include labor hoarding and a distorted output structure.

(e) Political distortions of consumer demand such as "conscious and effective control of aggregate demand during 1979-1980" in Hungary (see Hewett, p. 515).

(f) Outright fraud. Perhaps I should introduce a personal note at this point: my own father, who was an economist in the Socialist Republic of Romania before we emigrated to the U.S. in 1962, was witness to economic forgeries designed to mask the dismal failures of planned economy. The evidence coming from Romania today indicates that these practices are still very much alive.

In fact, Senator Heinz is correct when he says that "the concept of dumping -- sales at less than fair value -- is inherently a free-market concept... useful only to the extent that costs and prices in an economy are real, so that a fair value can be determined." He is also right in noting that U.S. "law has become seriously contorted to deal logically" with the economies of the communist block. My contention is simply that S958 is an even more seriously flawed contortion than the law it attempts to replace.

Yours truly,

Juliana Geran Pilon

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U.S.-G.D.R. TRADE AND ECONOMIC COUNCIL
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February 10, 1982

Honorable John C. Danforth
Chairman
Subcommittee on International Trade
Senate Committee on Finance
Room 2227, Dirksen Senate Office Building
Washington, D.C. 20510

Re: S. 958

Dear Senator Danforth:

Please incorporate this submission as part of the hearing record on S. 958, a bill to create an artificial pricing remedy. This letter is submitted on behalf of the US-GDR Trade and Economic Council, established in 1977 with the blessing of the Departments of State and Commerce. The Council consists of some 25 major U.S. companies, all of which have had commercial experience with the GDR and who believe it is in the best interests of the United States to promote expansion and normalization of trade with the GDR. A list of Council members is attached.

There is in the GDR a companion organization, the GDR-US Trade and Economic Council, chaired by Dr. Beil, State Secretary, Ministry of Foreign Trade. The Councils meet jointly each year and subcommittees may meet more often.

The Commerce Department, through its Bureau of East-West Trade, spends a considerable amount of money each year in attempting to build exports. I have been a member of the East-West Advisory Committee since its inception and was Chairman of that committee for two years recently. Because of the current US-USSR tensions, there tends to be a subjective pressure against anything having to do with the Eastern European countries. Take, for example, the recent bit of publicity that our government has purchased Optima manual typewriters from East Germany. Overlooked is the fact that there is no domestic source of manual typewriters so the alternative would be to buy Brazilian-made or West German-made and pay a premium of something like $40 or $50!

High on the Council's list of objectives is to work toward reduction of barriers to trade. The statistics will show a two-way US/GDR trade for 1980 and 1981 of over $500 million, which is in our favor by a ratio of at least ten to one. If the sales of European subsidiaries of American corporations are added, the GDR purchases well exceed $1 billion annually. The GDR purchases approximately $450 million worth of agricultural products from the U.S. for which they pay in hard currency. On the other hand, the GDR has a relatively limited list of goods they can sell to the U.S. because of the high tariffs that apply to column 2 countries.

One item that the GDR can sell is unrefined montan wax. The wax plant at Amsdorf has been the classic source of montan wax and the predominant world supplier of this item since the turn of the century because of the richness of the wax-bearing lignite in this region. This item has been imported into the U.S. from Germany since 1907 and there is only one other commercial supplier, the American Lignite Products Company, a California concern. The GDR Amsdorf facility is fully integrated and is highly efficient.

Under the provisions of S. 958 as introduced, German montan wax would have to be priced at or above the price of ALPCO (American Lignite Products Company) wax in order to avoid an "artificial pricing" duty for the difference. Obviously, this would vest a sole U.S. producer like ALPCO with monopoly pricing power even though in fact there is no unfair pricing of the article. ALPCO has limited production and probably less efficient manufacturing and could not in any event supply the U.S. market alone.

In the case of montan wax, the Department of Commerce has just completed a lengthy investigation in which it has determined that no dumping duties should be assessed on this article. The Department of Commerce utilized a surrogate country analysis and chose to value the East German wax on the basis of prices and wages in the Federal Republic in Germany. It is well known that the FRG has a level of economic development which is well ahead of that in the GDR but, even by this difficult standard, the East German wax was not shown to be sold at an unfair price.

In 1971, in 1978 and again in 1980, tariff bills were introduced to impose a high rate of duty on montan wax from the GDR but each time the Congress refused to enact the legislation. In addition to the dumping proceeding, ALPCO also filed a market disruption petition under section 406. This petition was also rejected. An established trade pattern has existed for over 75 years and I strongly urge that this pattern of trade not be upset by bestowing a monopoly on a single U.S. producer.

Sincerely,

JOttmar

Jerome Ottmar
Chairman

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cc: The Honorable John H. Chafee
United States Senate

December 1981

LIST OF MEMBERS
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Armco International, Inc. Division of Armco Inc. 375 Park Ave. New York, NY 10022 212-751-8066	Delegate:	William J. O'Hara, Jr., Vice Pres.
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Citibank, N.A. 399 Park Ave. New York, NY 10043 212-559-1000	Delegate:	E. William Hawley, Vice Pres. in the office of the Vice Chairman 212-559-1047
Coca-Cola Company 310 North Avenue, N.W. Atlanta, GA 30313 404-898-2254	Delegate:	Claus M. Halle, Sr. Exec. V.P.
	Alternate:	Reinhard M. Beltz, Regional Mgr., North East European Countries Coca-Cola GmbH Max-Keith Strasse 66 4300 Essen, W. Germany

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Control Data Corporation 8100 34th Ave., South Minneapolis, MN 55440 612-853-8100	Delegate:	Robert D. Schmidt, Vice Chairman
	Alternate:	George K. Bardos, Vice Pres., Market Development 6003 Executive Blvd. Rockville, MD 20852 301-468-8000
Dow Chemical Company 2030 Dow Center Midland, MI 48640 517-636-1000	Delegate:	Paul G. Stroebel, Director, Business Development 517-636-6084
	Alternate:	S. Thomas Orley, Regional Gen. Mgr., Eastern Region Dow Chemical GmbH Wohllebengasse 6 1010 Vienna, Austria
E.I. duPont de Nemours & Co., Inc. Wilmington, DE 19898 302-774-1000	Delegate:	Robert M. Aiken - Vice Pres. - International
Dyson-Kissner-Moran Corp. 230 Park Ave. New York, NY 10017		
Honeywell Inc. Honeywell Plaza Minneapolis, MN 55408 612-870-2361	Delegate:	Robert L. Patton, Vice Pres., Corporate Field Marketing
	Alternate:	Richard W. Skow, Director-Internat'l., Industrial Business Operations, Process Management Systems Div. Honeywell Inc. 16404 North Black Canyon Highway Phoenix, AZ 85023 602-863-5998
Levi Strauss Eximco, S.A. 1155 Battery St. San Francisco, CA 94106 415-544-6000	Delegate:	David D. Smith, President 414-544-7212
National Machine Tool Builders Assn. 7901 Westpark Drive McLean, VA 22101 703-893-2900	Delegate:	James A. Gray, President
Philipp Brothers Division of Phibro Corp. 1221 Avenue of the Americas New York, NY 10020 212-575-5900	Delegate:	Ludwig Jesselson, Chairman
	Alternate:	David Tendler, President

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RCA 30 Rockefeller Plaza New York, NY 10020 212-621-6000	Delegate:	Julius Koppelmann, Group Vice Pres.
	Alternate:	Eugene A. Sekulow, Exec. V.P., Corporate Affairs
Rockwell International Corp. 600 Grant St. Pittsburgh, PA 15219 412-565-2000	Delegate:	Richard W. Foxen, Vice Pres., International
Standard Oil Co. (Indiana) P.O. Box 5910A Chicago, IL 60680 312-856-6111	Delegate:	H. Laurance Fuller, Exec. Vice Pres. 312-856-2465
	Alternate:	Robert C. Arnold, Gen. Mgr., Patents & Licensing
Standard Oil Co. (Ohio) Midland Building Cleveland, Ohio 44115 216-575-4141	Delegate:	Glenn R. Brown, Sr. Vice Pres.
	Alternate:	Larry W. Evans, Manager, Patent & License Division 216-575-3715
Alfred C. Toepfer International Inc. 21 West St. New York, NY 10006 212-425-0119	Delegate:	Karl H. Schlunk, President
Union Carbide Corp. 270 Park Ave. New York, NY 10017 212-551-4956	Delegate:	Dr. Thomas J. Hall, Assistant to Chairman, Union Carbide Europe (43rd floor)
Union Oil Co. of California Union Oil Center Los Angeles, CA 90017 213-486-7600	Delegate:	Fred L. Hartley, Chairman
	Alternate:	William J. Baral, Vice Pres., Technology Sales Union Science & Technology Div. P.O. Box 76 Brea, CA 92621 714-528-7201
Amtel, Inc. P.O. Box 6447 Providence, RI 02940 401-331-2400	Delegate:	Jerome Ottmar, President
	Alternate:	Harvey Katz, Chairman Litwin S.A. 10, rue Jean-Jaures 92 Puteaux, France 776-43-44

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UNITED STATES SENATE
COMMITTEE ON FINANCE
SUBCOMMITTEE ON INTERNATIONAL TRADE

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Public Hearing On Senate Bill 958
"A Bill to Amend the Trade Act of 1974 to Provide a Special Remedy for the Artificial Pricing of Articles Produced by Nonmarket Economy Countries"

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AMERICAN HARDBOARD ASSOCIATION'S COMMENTS CONCERNING SENATE BILL 958

* * * * *

February 10, 1982

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COMMENTS OF
AMERICAN HARDBOARD ASSOCIATION

The American Hardboard Association ("AHA") submits these comments in support of Senate Bill 958, "a bill to amend the Trade Act of 1974 to provide a special remedy for the artificial pricing of articles produced by nonmarket economy countries."

AHA is distressed by the impact on the United States economy generally, and the hardboard industry specifically, of imports into the United States from nonmarket economy countries which do not operate on free market principles. Imports from nonmarket economy countries which do not operate on free market principles may be priced in an arbitrary and artificial manner, placing United States industries which have to respond to the free market pricing mechanism at a severe, unfair disadvantage. AHA believes Senate Bill 958 will help combat this mode of unfair international trade practice and complement current trade laws covering antidumping and countervailing duties.

I. THE AMERICAN HARDBOARD ASSOCIATION

The American Hardboard Association, headquartered in Palatine, Illinois, is the national trade organization representing manufacturers of hardboard products. In addition to serving as a central clearing house on industry and technical information, AHA is concerned with statistical reports, standard/specification programs, research activities, building codes, environmental affairs, educational publications, manufacturing and safety activities and governmental relations. AHA also administers a quality conformance program for hardboard siding.

Hardboard is a wood-based product manufactured by interfelting lignocellulosic fibers and consolidating them under heat and pressure to a density of 31 pounds per cubic foot or greater. Hardboard is used for exterior siding, interior wall paneling, household and commercial furniture, and numerous other industrial and commercial products. The 17 manufacturing plants of the nine United States members of AHA produce over 80 percent of the United States origin shipments. The members of AHA are listed on Exhibit A attached hereto. The plant locations and mill capacities of the hardboard industry are shown on Exhibit B attached hereto.

II. THE IMPACT OF IMPORTS FROM NONMARKET ECONOMY COUNTRIES ON THE HARDBOARD INDUSTRY

Directly or indirectly, hardboard demand is highly dependent on housing and mobile home construction.1/ The domestic hardboard industry has experienced a decline in employment of over 20 percent since 1978.2/ Use of plant

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1/ U.S.I.T.C. Publication 841, "Summary of Trade and Tariff Information, Hardboard TSUS Items 245.00 - 245.40," page 12 (Aug. 1981). ("U.S.I.T.C., Hardboard").

2/ U.S.I.T.C., Hardboard p. 6.

facilities for the industry during the last half of 1981 declined to approximately 61 percent of capacity.

Admittedly many factors other than imports from nonmarket economy countries affect the hardboard industry. The recent decline is attributable in part to low levels of building construction in recent years.[3] However, factors such as a nationwide recession and high interest rates are influences inherent in a free market economy which affect all kinds of industries and AHA, as a proponent of free trade practices, accepts the reality of cyclic trends in business.

On the other hand, hardboard is a homogeneous product and product differentiation is relatively unimportant in securing markets. Most marketing efforts are based on price and service.[4] Artifically priced imports from countries which do not allow the free market mechanism to operate have adversely affected, and will continue to adversely affect, the domestic hardboard industry in a manner which should not be condoned and permitted to continue.

The domestic hardboard industry produced over $600,000,000 of hardboard per annum in the years 1978 through 1980. Imports averaged over $37,000,000 a year, or a total of over $113,000,000, for this time period. Imports from nonmarket economy countries were significant, with the U.S.S.R. being the second leading exporter of hardboard into the United States.[5] As an example, in 1978 imports from the U.S.S.R., Romania and Poland had a total customs value of over $9,000,000, or 22 percent, of all imports of hardboard products into the United States.[6]

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[3] U.S.I.T.C., Hardboard pp. v, 9.

[4] U.S.I.T.C., Hardboard p. 10.

The impact of imports is even greater on a percentage basis of total consumption when quantity of shipments is examined. In the last five years, imports have represented just under 10 per cent of domestic consumption on a quantity basis.[7] In the three month period of July through September, 1981, for example, almost 30 percent of the square footage of all hardboard imports came from the nonmarket economy countries of the U.S.S.R., Poland and Romania.[8]

Although the customs value of hardboard imports has declined somewhat in the last three years, there nevertheless continues to be an impact on the domestic hardboard industry of the artifically low prices of products originating from nonmarket economy countries. An illustration of the pricing problems facing the hardboard industry with respect to trade from nonmarket economy countries can be seen in the import figures of October, 1981 for non-face finished hardboard (T.S.U.S. Item No. 245.2020).[9] The average customs value per short ton of imports under T.S.U.S. Item No. 245.2020 from the U.S.S.R. was $144. This is over 30 percent less than the customs value of similar imports from Brazil, and 40 percent less than the customs value of imports in this classification from Canada.[10]

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[5] U.S.I.T.C., Hardboard p. 30. The U.S.S.R. ranks second in the world in hardboard production and is the world's leading exporter, while importing no hardboard.

[6] U.S.I.T.C. Hardboard p. 26.

[7] U.S.I.T.C., Hardboard p. 13.

[8] U.S. Department of Commerce - Bureau of Census, Special Report FT 8027.

[9] Valued at over $96.66 2/3 per short ton.

In recent years, the U.S.S.R. has become by far the principal exporter to the U.S. of low-valued hardboard (T.S.U.S. Item Nos. 245.00 to 245.10), accounting for almost seventy-five percent of the quantity imported annually during 1977 to 1980.[11] The impact of the artificially low prices of hardboard products from nonmarket economy countries is dramatically illustrated by a review of the figures relating to hardboard in the T.S.U.S. Item No. 245.10 classification,[12] where U.S.S.R. shipments have dominated this import classification:

Hardboard
(Square Feet)
1/8" Standard

	Imports (T.S.U.S. 245.10)		U.S.S.R. Imports/Ratio to All Imports
Year	U.S.S.R.	Total	
1976	42,570,000	96,384,000	44%
1977	101,868,000	120,990,000	84.2%
1978	161,559,000	221,928,000	72.8%
1979	147,477,000	157,281,000	93.7%
1980	40,551,000	45,030,000	90.1%

Source: U.S. Department of Census,
Bureau of Census Reports.

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[10] U.S. Department of Commerce - Bureau of Census, Special Report FT 8027.

[11] U.S.I.T.C., Hardboard, p. 14.

[12] Valued at over $48.33 1/3 but not over $96.66 2/3 per short ton.

The average customs value of these imports under T.S.U.S. Item No. 245.10 from the U.S.S.R. for 1980 was $22.42 per thousand square feet. The average customs value of similar imports from other countries for 1980 was $31.73 per thousand square feet.

AHA has been concerned by the historical impact on the domestic hardboard industry of substantial imports from certain nonmarket economy countries, such as the U.S.S.R.,[13] and is becoming increasingly concerned about future changes in production and trade patterns that may lead to increased unfair import trade from other nonmarket economy countries. In other countries, especially developing nations, the economic orientation of a ruling government can change quite quickly, and there could be artificial pricing of imports in the future from countries which would not currently be classified as nonmarket economies but which could become so almost overnight.

III. THE REASONS FOR AHA'S SUPPORT OF SENATE BILL 958

AHA supports the artificial pricing concept of Senate Bill 958 because it provides for:

(1) a new, more effective treatment of the special problem of unfair trade practices of nonmarket economy countries; and

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[13] Canada investigated complaints of sales at less than fair value of U.S.S.R. and Poland hardboard imports and found material injury to the production of like goods in Canada. Finding of the Anti-dumping Tribunal in Inquiry No. ADT-4-81 Under Section 16 of the Anti-dumping Act (September 23, 1981).

(2) a more objective procedure, by lessening executive discretion under Section 406 of the 1974 Trade Act and treating the issue as one of fair trade and fair business practice, not international politics.

The effectiveness of the current antidumping and countervailing duty laws[14] depends upon the nature of the problem being treated. The concept of dumping usually is not appropriate in a nonmarket economy context due to the ambiguity of market value in a nonmarket economy country. The inability to accurately ascertain the foreign market value, which is aggravated by uncooperative governments, diminishes radically the utility of the antidumping law to protect domestic industry from unfair price discrimination.[15]

Countervailing duties can be an effective remedy when the subsidies involved are identifiable and specific, or otherwise definable.[16] In a nonmarket economy, it is likely that the concept of a subsidy is unworkable because the entire economy is influenced and controlled by that country's government in contrast to a specific government intrusion.

Senate Bill 958 would create a remedy appropriate to the realities of a nonmarket economy. A duty would be imposed if the imported product from a nonmarket economy country is priced at a price below the lowest free market price of like articles, looking at the lowest average price for like articles in the U.S. or an appropriate free market country. The proposed legislation thus avoids the problems described above which are inherent in applying a countervailing or antidumping duty to a nonmarket economy import.

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[14] 19 U.S.C. § 1671 et seq.

[15] 19 U.S.C. § 1677b(c). To determine market value when a state controlled economy is involved, present law requires examination of foreign market value in a non-state controlled economy which is at a comparable stage of economic development. 19 C.F.R. §353.8(b)(1).

[16] 19 U.S.C. § 1677(5).

AHA believes that the flexibility of the proposed legislation in allowing for an artificial pricing investigation to be transformed into a countervailing or antidumping investigation (and vice versa) is a workable and appropriate solution to the difficulties confronting the investigators in seeking the necessary data to establish the existence or non-existence of unfair trade practices. If a nonmarket economy country cooperates in an United States government trade investigation, AHA would have no objection to that country being placed on the same footing as any other free market economy in the world. On the other hand, if a nonmarket economy country is not willing to assist in an investigation of the possible abuse of import privileges, that country should not have available the possibly beneficial shield provided by existing law which requires a complainant to establish the existence of material injury.

The issue of trade practices is primarily a business and economic concern, which should not be confused with international politics. Senate Bill 958 recognizes this in two different ways.

First, by eliminating the emotion-laden and ambiguous "communist country" provisions of Section 406 of the Trade Act of 1974, the proposed legislation emphasizes that the trade problem involves not the political label attached to a government but rather the basis on which the economy of that country operates. The realities of the world marketplace require recognition of the fact that there are many countries whose economies do not operate on free market principles yet whose governments may not fall into a traditional definition of being "communist."

Second, Senate Bill 958 provides for a procedural framework for an artificial pricing investigation virtually identical to a countervailing duty investigation. This allows for objective investigation and remedies by the International Trade Commission and International Trade Administration, and diminishes the possibility that U.S. business concerns will be unwitting pawns in the vagaries of international politics.

CONCLUSION

For the reasons discussed above, AHA urges the Finance Subcommittee to vote favorably on Senate Bill 958.

Respectfully submitted,

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EXHIBIT A

The member companies of the American Hardboard Association are:

Abitibi-Price Corporation
P.O. Box 501
Birmingham, Michigan 48012

Boise Cascade Corporation
Shelard Towers - Ste. 235
600 South County Road 18
St. Louis Park, Minnesota 55426

Canadian Forest Products Ltd.
Plywood and Hardboard Division
440 Canfor Avenue
New Westminster, B.C. V3L 3C9

Champion International Corporation
Building Products Division
One Champion Plaza
Stamford, Connecticut 06921

Evans Products Company
1115 S.E. Crystal Lake Drive
Corvallis, Oregon 97330

Forest Fiber Products Company
P.O. Box 68
Forest Grove, Oregon 97116

MacMillan Bloedel Building Materials
50 Oak Street
Weston, Ontario M9N 1S1

Masonite Corporation
29 North Wacker Drive
Chicago, Illinois 60606

Superior Fiber Products, Inc.
North Fifth Street & Bayfront
Superior, Wisconsin 54880

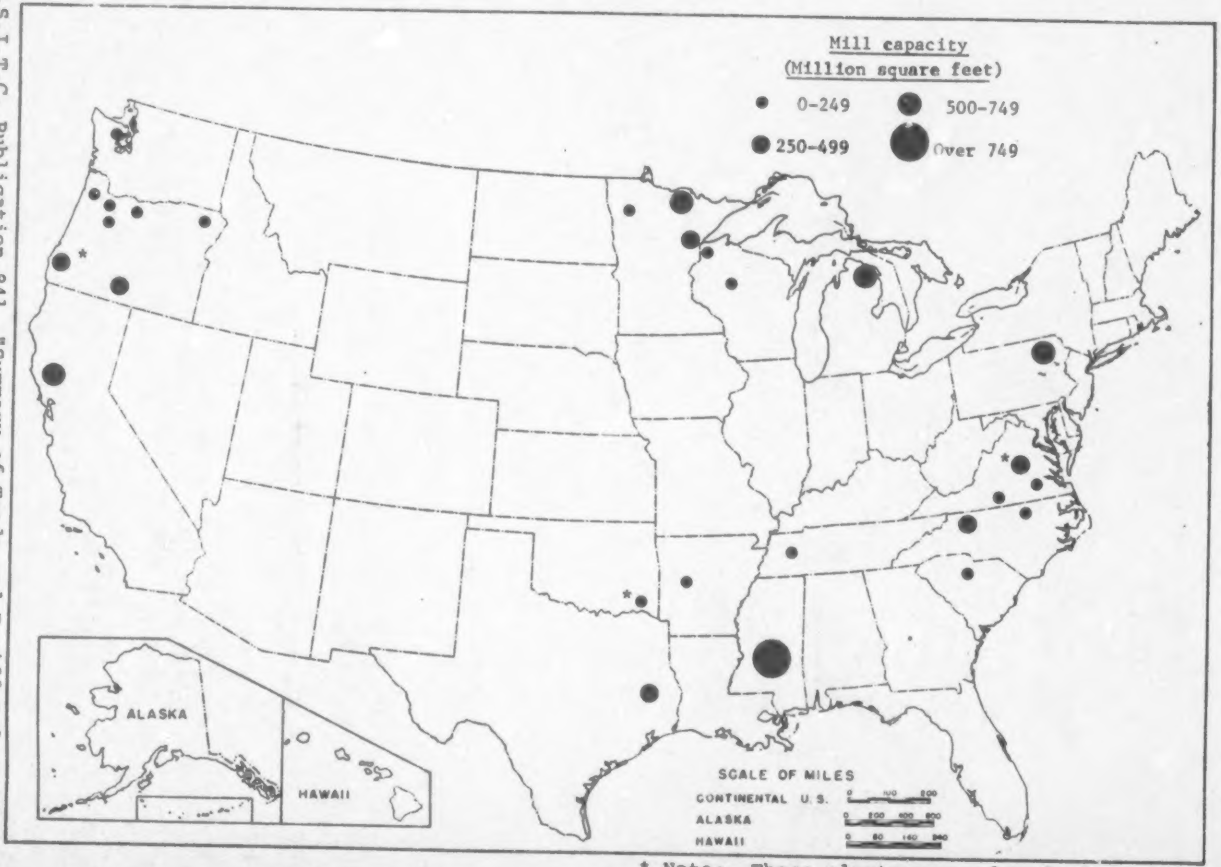
Superwood Corporation
14th Avenue West & Waterfront
Duluth, Minnesota 55802

Temple Division
Temple-Eastex, Inc.
Diboll, Texas 75941

(53-Q)

EXHIBIT B

Figure I.--Hardboard: Plant locations and capacities, 1980.


Mill capacity
(Million square feet)
0-249
250-499
500-749
Over 749
ALASKA
HAWAII
SCALE OF MILES
CONTINENTAL U.S.
ALASKA
HAWAII
*
*
*

Source: American Hardboard Association.

* Note: These plants were closed after Publication 841 went to press.

U.S.I.T.C. Publication 841, "Summary of Trade and Tariff Information, Hardboard TSUS Items 245.00 - 245.40," page 7 (Aug. 1981).

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